

No. 16147

VOL. 3094

United States
Court of Appeals
for the Ninth Circuit

WILL M. GILLIS,

Appellant,

vs.

MINERS AND MERCHANTS BANK OF
ALASKA, a Corporation,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILED
FEB 25 1959
PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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P.O. Box 156,

Nome, Alaska;

FAULKNER, BANFIELD AND

BOOCHEVER, and

JOHN H. DIMOND,

P.O. Box 1121,

Juneau, Alaska.

In the District Court for the District of Alaska,
Second Judicial Division

No. 4180 Civil

WILL M. GILLIS,

Plaintiff,

vs.

MINERS AND MERCHANTS BANK OF
ALASKA,

Defendant.

COMPLAINT

Comes now the Plaintiff herein and for cause of
action alleges:

I.

That the Plaintiff Will M. Gillis is a resident of
the Territory of Alaska, residing at Nome, in the
Second Judicial Division, and within the jurisdiction
of this Court.

II.

That the Defendant the Miners and Merchants
Bank of Alaska, is a banking corporation, engaged
in the business of general banking at Nome, Alaska.

III.

That the Plaintiff did on the 21st day of March,
1957, make an assignment of contract to the De-
fendant herein, a copy of which is attached hereto,
marked Exhibit "A," and made a part hereof.

IV.

That the Defendant did, while holding said as-

signment, receive progress payments on said assignment in the sum of Twenty-three Thousand Five Hundred Dollars (\$23,500.00), out of which it paid the sum of Eleven Thousand One Hundred Fifty-four Dollars and Six Cents (\$11,154.06), to themselves for monies advanced and paid for the benefit of the Plaintiff herein.

V.

That the Defendant held, retained and converted to its own use the sum of Eleven Thousand Two Hundred Twenty-five Dollars (\$11,225.00).

VI.

That due and proper demand was made for the refund of the said sum of Eleven Thousand Two Hundred Twenty-five Dollars (\$11,225.00) and no part thereof has been paid to Plaintiff.

For a second cause of action the Plaintiff reiterates and realleges each and every allegation contained in Paragraphs I, II, III, IV, V and VI with the same full force and effect as if fully set forth herein.

I.

That the Plaintiff is engaged in the general contracting business in the Second Judicial Division of the Territory of Alaska, and the securing of building materials and supplies in said business is dependent upon transportation by steamship. That there are two steamers from Seattle to Nome, Alaska, Plaintiff's headquarters, each year.

II.

That by reason of Defendant's refusal to pay to Plaintiff the said sum of Eleven Thousand Two Hundred Twenty-five Dollars (\$11,225.00) as aforesaid, the Plaintiff was unable to order and have shipped necessary building materials and supplies on the last steamer leaving Seattle, Washington, to Nome, Alaska, in the year of 1957. That by reason of the Defendant withholding the said sum of Eleven Thousand Two Hundred Twenty-five Dollars (\$11,225.00), and converting the same to its own use the Plaintiff has been damaged in the sum of Twenty-five Thousand Dollars (\$25,000.00).

Wherefore the Plaintiff demands judgment in the sum of Eleven Thousand Two Hundred Twenty-five Dollars (\$11,225.00), with interest, on the first cause of action and damages in the sum of Twenty-five Thousand Dollars (\$25,000.00) upon the second cause of action, together with Plaintiff's costs and attorneys' fees.

/s/ FRED D. CRANE,

TAYLOR & TAYLOR,

By /s/ WARREN A. TAYLOR,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed November 30, 1957.

[Title of District Court and Cause.]

DEFENDANT'S MOTION TO DISMISS
UNDER RULE 12(b) (6) FRCP

Defendant moves to dismiss plaintiff's complaint on the ground that it fails to state any claim upon which relief can be granted.

The reasons for this motion are specifically set forth in the attached memorandum in support thereof.

Dated: Dec. 18, 1957.

/s/ JAMES A. VON DER HEYDT,
FAULKNER, BANFIELD &
BOOCHEVER,

/s/ N. C. BANFIELD,

/s/ JOHN H. DIMOND,
Attorneys for Defendant.

[Endorsed]: Filed December 18, 1957.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes Now the Plaintiff herein and for cause of action alleges:

I.

That the Plaintiff Will M. Gillis is a resident of the Territory of Alaska, residing at Nome, in the

Second Judicial Division, and within the jurisdiction of this court.

II.

That the Defendant Miners and Merchants Bank of Alaska, is a banking corporation, engaged in the business of general banking at Nome, Alaska.

III.

That the Plaintiff did on the 21st day of March, 1957, make an assignment of contract to the Defendant herein, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof.

IV.

That prior to the execution of the assignment marked "Exhibit A," and at the time of the execution thereof the Defendant agreed to pay unto itself sums of money equivalent to the advances to the Plaintiff under the assignment of the contract and the Defendant further agreed that any monies collected in excess of the monies due to the Defendant for the advances under said assignment shall be promptly remitted and paid to the Plaintiff upon the repayment of the advances made.

V.

The above-named Defendant prior to and at the time of the execution of the said assignment agreed that other than the indebtedness secured by the assignment to the Defendant no other claim or setoff or debt should be charged against the proceeds of the said assignment and that only the advances made by the Defendant shall be reimbursed by vir-

tue of a receipt of any money under the assignment and that any excess or balance over and above the advances of the Defendant shall be paid to the Plaintiff immediately upon receipt of the proceeds under the said assignment.

VI.

That the Defendant did, while holding said assignment, receive progress payments on said assignment in the sum of Twenty-three Thousand Five Hundred Dollars (\$23,500.00), out of which it paid the sum of Eleven Thousand One Hundred Fifty-four Dollars and Six Cents (\$11,154.06), to itself for monies advanced and paid for the benefit of the Plaintiff herein.

VII.

That in violation of the agreement between the parties and contrary to any understanding had the Defendant after having reimbursed itself the sum of \$11,154.06 without the consent of the Plaintiff herein under some pretense of creating an indebtedness which was not contemplated by and between the parties, misappropriated and converted the sum of \$11,225.00.

VIII.

That the Defendant held, retained and converted to its own use the sum of Eleven Thousand Two Hundred Twenty-five Dollars (\$11,225.00).

IX.

That due and proper demand was made for the refund of the said sum of Eleven Thousand Two

Hundred Twenty-five Dollars (\$11,225.00) and no part thereof has been paid to Plaintiff.

For a second cause of action the Plaintiff reiterates and realleges each and every allegation contained in Paragraphs I, II, III, IV, V, VI, VII, VIII and IX with the same full force and effect as if fully set forth herein.

I.

That the Plaintiff is engaged in the general contracting business in the Second Judicial Division of the Territory of Alaska, and the securing of building materials and supplies in said business is dependent upon transportation by steamship. That there are two steamers from Seattle, Washington, to Nome, Alaska, Plaintiff's headquarters, each year.

II.

That by reason of the Defendant's refusal to pay to the Plaintiff the said sum of \$11,225.00 as aforesaid and by reason of the Defendant's unwarranted and unlawful retention of the said sum of money, the Plaintiff was unable to order and have shipped necessary building materials and supplies on the last steamer leaving Seattle, Washington, to Nome, Alaska, in the year of 1957.

By virtue of the conduct of the Defendant herein the misappropriation and conversion of the said monies and preventing the Plaintiff from pursuing his business because of the lack of the accessibility of the funds for materials and supplies, the Plain-

tiff has been damaged in the sum of Twenty-five Thousand Dollars (\$25,000.00).

Wherefore, the Plaintiff demands judgment in the sum of Eleven Thousand Two Hundred Twenty-five Dollars (\$11,225.00), with interest, on the first cause of action and damages in the sum of Twenty-five Thousand Dollars (\$25,000.00) upon the second cause of action, together with Plaintiff's costs and attorney's fees.

/s/ FRED D. CRANE,

TAYLOR & TAYLOR,

By /s/ WARREN A. TAYLOR,
Attorneys for Plaintiff.

EXHIBIT A

Assignment of Contract

The undersigned, Will M. Gillis (hereinafter called "Assignor"), with his principal place of business at Nome, Alaska, for and in consideration of the sum of \$1.00 and other good and valuable consideration to him paid by the Miners and Merchants Bank of Nome, Alaska (hereinafter called "Bank"), receipt whereof is hereby acknowledged, does hereby transfer, set over and assign unto said bank, its successors and assigns, any and all amounts now due or owing, or which may hereafter

be or become due or owing, or remain unpaid at any time or times by the City of Nome, Nome, Alaska, to Assignor under or pursuant to the terms of that certain contract (and any amendments and supplements thereto) entered into by and between the undersigned Assignor and City of Nome, described as follows:

That certain Agreement, dated March 20th, 1957, by and between the City of Nome, Alaska, a municipal corporation organized and existing under the laws of the Territory of Alaska, and Will M. Gillis of Nome, Alaska, by the terms of which the Assignor has agreed to

“construct a two-room addition to the present old Nome public school building, as per plans before the City Council of the City, at its meeting of December 28, 1956, known and identified as Sheet No. 1, Nome Public School Building proposed addition, dated December 19, 1956, and, Sheet No. 2, Nome Public School Building proposed addition, dated December 20, 1956.”

has agreed to pay Assignor the sum of \$41,113.72 and the Undersigned Assignor does hereby designate and appoint said Bank, its successors and assigns, its true and lawful attorney or attorneys, with power irrevocable, for him, and in his name, place and stead to ask, demand, receive, receipt and give acquittance for any and all amounts which may become due or payable by the City of Nome, Alaska, under said contract or any amendments or supplements thereto, and in its discretion to file any claim

or to take any other action or proceeding, either in its own name, or in the name of the undersigned, or otherwise, which to said Bank or any successor or assignee thereof may seem necessary or desirable in order to collect or enforce the payment of any and all amounts which may become due or owing on account of said contract, or any amendments or supplements thereto.

Assignor does hereby represent and warrant unto said Bank that no payments have been made on account of said contract except as follows: No Dollars and that Assignor has not heretofore and will not hereafter alienate nor assign said contract or any right or interest therein or thereto.

The acceptance of this assignment by said Bank shall not obligate it to perform any duty, covenant or condition required to be performed by assignor under and by virtue of said contract or any amendments or supplements thereto.

This assignment is made and entered into to secure and provide for the payment of any and all obligations now due or owing or which may hereafter be or become due or owing by the undersigned Assignor to the Bank.

In Witness Whereof, the Assignor has caused this instrument to be duly executed this 21st day of March, 1957.

/s/ WILL M. GILLIS,
Assignor.

The above assignment is agreed to and accepted
by the City of Nome.

.....,
Mayor.

United States of America,
Territory of Alaska—ss.

On this 21st day of March, 1957, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared Will M. Gillis, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal hereto affixed the day and year in this certificate above written.

/s/ FRED D. CRANE,
Notary Public in and for the
Territory of Alaska.

My commission expires October 15, 1960.

[Endorsed]: Filed March 17, 1958.

[Title of District Court and Cause.]

DEFENDANT'S ANSWER TO PLAINTIFF'S
AMENDED COMPLAINT

Answer to First Cause of Action

1. Defendant admits the allegations in paragraphs I, II, and III; the allegations contained in the first four lines of paragraph IV ending with the word "contract"; and the allegations contained in paragraph VI.

2. Defendant denies the remaining allegations in paragraph IV, and all allegations in paragraphs V, VII, VIII and IX, with the exception of that portion of paragraph IX which states that "no part thereof has been paid to plaintiff," which allegation defendant admits.

Answer to Second Cause of Action

1. Defendant incorporates herein by reference paragraphs 1 and 2 of its answer to plaintiff's first cause of action.

2. Answering paragraph I: (a) Defendant admits that plaintiff is engaged in the general contracting business in the Second Judicial Division of the Territory of Alaska; (b) Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations, and therefore denies the same.

3. Defendant denies the allegations in paragraph II.

Affirmative Defense

The second cause of action in plaintiff's amended complaint fails to state any claim upon which relief can be granted.

Defendant's Counterclaims

First Counterclaim

1. At all times mentioned herein, Ernest H. Gustafson and Robert H. Renshaw were co-partners doing business at Nome, Alaska, under the name of "North Star Bakery." For purposes of convenience, these two persons will hereafter be referred to generally as "North Star."

2. On or about September 15, 1954, North Star executed and delivered to plaintiff North Star's promissory note in the principal sum of \$19,854.83. A true copy of such note is hereto annexed, marked Exhibit No. 1 and made a part hereof.

3. At the time of the execution and delivery of the note, North Star executed, acknowledged and delivered to plaintiff a second real and chattel mortgage, transferring and conveying to plaintiff, as security for the indebtedness represented by the note, certain real and personal property therein described. The real property consisted of all of Lot 7 in Block H of the Townsite of Nome, Alaska, and will hereafter be referred to generally as the "mortgaged property."

The said mortgage was dated September 15, 1954,

and was filed for record in the office of the Recorder for the Cape Nome Recording Precinct on March 30, 1955, as Instrument No. 89848.

4. The mortgage referred to in paragraph 3 herein was subordinate to the lien of a prior and first real and chattel mortgage of the same property, securing the sum of \$38,000.00, from North Star to defendant. This mortgage was dated September 15, 1954, and was filed for record in the office of the said Recorder on September 15, 1954, as Instrument No. 89669.

5. On or about January, 1957, an agreement was made among plaintiff, defendant and North Star, which resulted in the following:

(a) Plaintiff agreed in writing to sell to defendant all of plaintiff's right, title and interest in the mortgage referred to in paragraph 3 herein, in consideration of the payment to plaintiff of \$15,000.00. A true copy of such agreement is hereto annexed, marked Exhibit No. 2 and made a part hereof.

(b) On or about January 30, 1957, defendant paid to plaintiff the sum of \$15,000.00. At the same time and contemporaneously with such payment, plaintiff executed and delivered to defendant the former's assignment of all his right, title and interest in the mortgage referred to in paragraph 3 herein, and also acknowledged receipt of the payment of \$15,000.00. A true copy of such assignment is hereto annexed, marked Exhibit No. 3 and made a part hereof.

In addition, plaintiff executed and delivered to North Star plaintiff's release of the mortgage referred to in paragraph 3 herein. Such release, entitled "Satisfaction of Second Real and Chattel Mortgage," was filed for record on January 31, 1957, in the office of the Recorder for the Cape Nome Recording Precinct, as Instrument No. 90533. A true and correct copy of such Satisfaction of Second Real and Chattel Mortgage is hereto annexed, marked Exhibit No. 4 and made a part hereof.

(c) The said payment of \$15,000.00 made by defendant to plaintiff constituted a loan in that amount from defendant to North Star, to be added to the balance of North Star's original indebtedness to defendant referred to in paragraph 4 herein. Consequently, at this same time North Star executed and delivered to defendant the former's promissory note in the principal sum of \$110,000.00, together with a conveyance and transfer to defendant of the mortgaged property as a mortgage and as security for such loan of \$110,000.00. This new mortgage, dated January 22, 1957, was filed for record in the office of the said Recorder on January 25, 1957, as Instrument No. 90525, and recorded in Volume 237 of Mortgages at pp. 25-30.

(d) Since the purpose of the new mortgage was to secure the total indebtedness from North Star to defendant after the loan of the said \$15,000.00, the mortgage from North Star to defendant referred to in paragraph 4 herein was released by defendant by

way of the execution, acknowledgment and delivery by defendant to North Star of an instrument entitled "Satisfaction of Real and Chattel Mortgage." This instrument was dated January 30, 1957, and was filed for record in the office of the said Recorder on January 31, 1957, as Instrument No. 90530.

6. In the civil action entitled Joseph Wallace vs. Will M. Gillis, No. 4107, in this court, a writ of attachment was issued on May 5, 1956. On May 15, 1956, under the authority of said writ, the United States Marshal at Nome seized and took into his possession from plaintiff the promissory note (Exhibit No. 1).

7. At the time that plaintiff received from defendant the said sum of \$15,000.00, in full payment of the promissory note, plaintiff knew that the note was not in his possession, but had been attached by the United States Marshal; and plaintiff intentionally withheld and kept such facts from the knowledge of defendant and North Star for the purpose of obtaining the said payment of \$15,000.00. Neither defendant nor North Star were aware that the note was not in plaintiff's possession or that he did not have the right to possession of the same; and if they had had such knowledge, neither defendant nor North Star would have paid to plaintiff the said sum of \$15,000.00 or any other amount.

8. In the said civil action of Wallace vs. Gillis, No. 4107, judgment was entered by this court on April 25, 1957. Among other things, the judgment provided as follows:

“It Is Further Ordered, Adjudged and Decreed, that the U. S. Marshal at Nome, Alaska, sell, at public auction, that certain promissory note executed by Ernest H. Gustafson and Robert H. Renshaw, d/b/a North Star Bakery, in favor of defendant for the sum of Nineteen Thousand Eight Hundred Fifty-four and 83/100's (\$19,854.83) Dollars, now in the possession of the said Marshal and the same hereby is ordered sold in accordance with law, together with all of the interest of the said defendant in and to Lot Seven (7) of Block ‘H’ of the Townsite of Nome, Alaska, by reason of that certain real and chattel mortgage securing said debt, recorded in the office of the U. S. Commissioner of the Cape Nome Precinct, Second Division, Alaska, as instrument No. 89,849, and that a good and sufficient title to the said instrument and property be executed and delivered by the said U. S. Marshal to the purchaser thereof.”

9. Execution was issued by this court on the said judgment and pursuant thereto, the United States Marshal, on or about June 18, 1957, gave public notice in writing that on June 28, 1957, he would sell at public auction, to the highest and best bidder, the following:

“That certain promissory note executed by Ernest H. Gustafson and Robert H. Renshaw, dba North Star Bakery, in favor of the defendant herein for the sum of \$19,854.83/100, said note then being in possession of the United States Marshal for the Second Division, District of Alaska; together with

all of the interest of the said defendant in and to Lot Seven (7), of Block 'H' of the Townsite of Nome, Alaska, by reason of that certain real and chattel mortgage securing said debt, recorded in the office of the U. S. Commissioner of the Cape Nome Precinct, Second Division of Alaska as Instrument No. 89,849."

A true copy of said Notice of Marshal's Sale is hereto annexed, marked Exhibit No. 3a and made a part hereof.

10. After it was brought to the notice and knowledge of defendant and North Star that North Star's promissory note to plaintiff had been attached and was in the hands of the United States Marshal at the time that plaintiff had been paid the \$15,000.00, defendant and North Star promptly demanded that plaintiff take action to protect defendant and North Star against liability on said note—which liability could then have been enforced either by a holder in due course of said note or by a transferee of such holder. Despite such demands, plaintiff failed and refused to take any such action.

11. On or about June 26, 1957, North Star filed with the Marshal a third party claim, alleging ownership of the note and setting forth the recorded release and satisfaction of the mortgage referred to in paragraph 3 (Exhibit No. 4). A true copy of such third party claim is annexed hereto, marked Exhibit No. 5 and made a part hereof.

12. Wallace, the judgment creditor of plaintiff, then posted bond to protect the Marshal against

such third party claim, and on or about June 29, 1957, the United States Marshal conducted his sale under the above-mentioned writ of execution and pursuant to said notice of sale. Wallace was the successful bidder at the sale, and for the sum of \$11,225.00 purchased from the Marshal the following:

(a) The promissory note (Exhibit No. 1).

(b) All of the interest of plaintiff in and to Lot 7 of Block H of the Townsite of Nome, Alaska.

A return of such sale is contained in an instrument entitled "Assignment and Bill of Sale" and executed by the United States Marshal for the Second Judicial Division of Alaska. A true copy of said Assignment and Bill of Sale is hereto annexed, marked Exhibit No. 6 and made a part hereof.

13. Following the sale referred to above, defendant and North Star were notified by Wallace, through his attorney, that Wallace intended to sell the note to a third party; and that unless defendant and North Star took immediate steps to redeem said note, such sale would be made. Again efforts were made by defendant and North Star to get plaintiff to take action to protect defendant and North Star against liability on said note, but plaintiff refused to indemnify defendant or North Star or to do anything to assume responsibility for payment and discharge of such note.

14. On July 13, 1957, North Star and defendant gave written notice that they intended to redeem

from Wallace any and all interest of plaintiff and themselves in the promissory note and in and to the mortgaged property. A true copy of said notice is hereby annexed, marked Exhibit No. 7 and made a part hereof.

15. On July 18, 1957, North Star and defendant purchased and redeemed from Wallace the said promissory note, together with all of the right, title and interest of Wallace in and to the mortgaged property, as described in the Marshal's Assignment and Bill of Sale (Exhibit No. 6). Defendant and North Star at this time paid Wallace the sum of \$11,225.00, and he in turn delivered to defendant the promissory note. A true copy of Wallace's Certificate of Redemption is hereby annexed, marked Exhibit No. 8 and made a part hereof.

16. On or about October 7, 1957, North Star in writing assigned to defendant all of North Star's right and interest, whatever it may be, in and to an existing right of action against plaintiff, based upon the promissory note above referred to which had been originally purchased from plaintiff by defendant and North Star for the sum of \$15,000.00, and later redeemed from Wallace for the sum of \$11,225.00. A true copy of said assignment is hereto annexed, marked Exhibit No. 9 and made a part hereof.

17. The payment of the said sum of \$15,000.00 made by defendant and North Star to plaintiff was a payment made under the influence of mistake, and induced by the failure of plaintiff to disclose to de-

fendant and North Star that at the time of such payment the promissory note had been attached by the United States Marshal. Plaintiff was not entitled to receive such money. By reason of these facts, and the matters alleged hereinbefore, plaintiff received the said sum of \$15,000.00 which he, in equity and good conscience, should not retain, and is obligated to repay and make restitution of the same to defendant, together with interest thereon at the rate of 6 per cent from January 30, 1957.

Second Counterclaim

1. Defendant realleges and incorporates herein by reference paragraphs 1 through 16 of its first counterclaim.

2. Wallace, the judgment creditor of plaintiff, at the time of the aforesaid sale by the Marshal, became a holder in due course of the promissory note. Such note, in his hands or in the hands of a person to whom he might have negotiated it, was an enforceable obligation against North Star.

3. By reason of the said sale by the Marshal, Wallace became, and any assignee or transferee of his would have become, the owner of all of the interest of plaintiff, as mortgagee, in and to North Star's mortgaged property, by virtue of the mortgage from North Star to plaintiff referred to in paragraph 3 of the first counterclaim herein. Defendant's interest in such property as mortgagee under the terms of the mortgage of September 15, 1954, referred to in paragraph 4 of the first counter-

claim herein, had been superior to the said mortgagee's interest of plaintiff. But, as alleged in paragraph 5 of the first counterclaim herein, defendant's original mortgage of September 15, 1954, was satisfied and released by defendant because of the matters alleged in the said paragraph 5, and the new mortgage from North Star to defendant of January 22, 1957, was executed, delivered and recorded subsequent to the execution, delivery and recording of the said mortgage from North Star to plaintiff.

By reason of the levy of the writ of attachment in the Wallace action (paragraph 6 of the first counterclaim) and entry of the judgment in such action (paragraph 8 of first counterclaim), and by reason of the matters alleged in the first paragraph of this paragraph 3, the mortgage lien of defendant under its mortgage of January 22, 1957, became junior and inferior to the mortgage lien of plaintiff under his mortgage of September 15, 1954.

4. In order to protect itself and North Star against an enforceable demand for payment of the promissory note sold by the Marshal, and in order to protect defendant's mortgage lien against and interest in the mortgaged property, defendant was compelled to pay Wallace the sum of \$11,225.00 and redeem the note and all of plaintiff's and Wallace's right, title and interest in and to the mortgaged property and the mortgage from North Star to plaintiff of September 15, 1954.

5. The said payment of \$11,225.00 in order to effect such redemption constituted a payment which

plaintiff, in equity and good conscience, ought to have made. Plaintiff has been unjustly enriched at the expense of defendant. Therefore, defendant is entitled to recover such payment of \$11,225.00 from plaintiff, together with interest thereon at the rate of 6 per cent per annum from July 18, 1957.

Third Counterclaim

1. Defendant realleges and incorporates herein by reference paragraphs 1 through 16 of its first counterclaim, and paragraphs 2 and 3 of defendant's second counterclaim.

2. The payment of the sum of \$11,225.00, which defendant was compelled to make by reason of the circumstances hereinbefore stated, constituted a partial payment of Wallace's judgment against plaintiff, which payment constituted the primary obligation of plaintiff.

3. By reason of the foregoing, defendant became subrogated to all of Wallace's rights and claims against plaintiff in respect to the said judgment which Wallace had obtained against plaintiff, to the extent of \$11,225.00. Therefore, by virtue of such right of subrogation, defendant has the right to enforce said judgment against plaintiff and is entitled to recover from plaintiff the said sum of \$11,225.00, together with interest thereon at the rate of 6 per cent per annum from July 18, 1957.

Wherefore, defendant prays as follows:

1. For judgment against plaintiff, in the alternative, as follows:

(a) On defendant's first counterclaim, in the amount of \$15,000.00, together with interest thereon at the rate of 6% per annum from January 30, 1957.

(b) On defendant's second counterclaim, in the amount of \$11,225.00, together with interest thereon at the rate of 6 per cent per annum from July 18, 1957.

(c) On defendant's third counterclaim, in the amount of \$11,225.00, together with interest thereon at the rate of 6 per cent per annum from July 18, 1957.

2. For judgment against plaintiff for defendant's costs, including attorneys' fees in the amount of \$1,200.00.

3. That plaintiff's complaint be dismissed with prejudice.

Dated: April 19, 1958.

/s/ JAMES A. VON DER HEYDT,
FAULKNER, BANFIELD &
BOOCHEVER,

/s/ JOHN H. DIMOND,
Attorneys for Defendant.

Two copies received this 14th day of April, 1958

/s/ FRED D. CRANE,
Of Attorneys for Plaintiff.

EXHIBIT No. 1

Installment Promissory Note

\$19,854.83

Nome, Alaska,

September 15, 1954.

For Value Received, we promise to pay to Will M. Gillis, of Nome, Alaska, or order, the sum of Nineteen Thousand Eight Hundred Fifty-four Dollars and Eighty-three Cents (\$19,854.83), with interest thereon from date until paid at the rate of eight per cent (8%) per annum, in the manner following, that is to say:

In thirty-nine installments of Five Hundred Dollars (\$500.00) each, and one final installment of Three Hundred Fifty-four Dollars and Eighty-three Cents (\$354.83), the first of said installments to be paid on the 15th day of September, 1957, without grace, together with interest then due, and a like installment on the 15th day of each and every month thereafter, without grace, until the whole of said principal sum has been paid, together with interest as above specified, which said interest shall be paid monthly from date until the full principal sum has been paid by installments as above set forth.

Principal and interest are payable only in legal monies of the United States of America and in the event of a suit to enforce the collection of this note, or any portion thereof, we further agree to pay a reasonable attorney fee in said suit.

Promisors tender and deliver this promissory note as full settlement of any and all claims and indebtedness of whatever nature which is due and owing the promisee above named as of the date hereof, and said promisee accepts delivery of this said note as such full settlement.

This installment note is secured by a second real and chattel mortgage.

/s/ ERNEST H. GUSTAFSON,

/s/ ROBERT H. RENSHAW,

Co-partners, d/b/a North

Star Bakery, Nome Alaska.

(Single page.)

EXHIBIT No. 2

Agreement to Sell

I, hereby agree to sell all of my right, title and interest in that certain Second Mortgage in the name of Ernest H. Gustafson and Robert H. Renshaw covering property known as the North Star Bakery, to the Miners and Merchants Bank of Alaska.

The above-mentioned mortgage was dated March 3, 1955 in the original amount of nineteen thousand eight hundred fifty-four dollars and eighty-three cents (\$19,854.83) and I agree to sell this mortgage to the Miners and Merchants Bank of Alaska for fifteen thousand dollars (\$15,000.00).

Dated this 21st day of Jan., 1957.

/s/ WILL M. GILLIS.

EXHIBIT No. 3

Assignment

For value received in the amount of Fifteen thousand dollars (\$15,000.00), I hereby assign, sell and deliver to the Miners and Merchants Bank of Alaska all my rights, title and interest in that certain Second Real and Chattel Mortgage I hold in the name of Ernest H. Gustafson and Robert H. Renshaw doing business under the name of North Star Bakery, further described as follows:

All of Lot Seven (7) in Block "H" in the City of Nome, together with all improvements thereon, all building materials to be used from Polet's store on East Front Street. Also, all bakery equipment and restaurant furnishings, as well as all supplies belonging to North Star Bakery. Promissory note attached in the amount of \$19,854.83 drawing interest at 8%. Payments to be made in thirty-nine (39) installments of \$500.00 each, dated September 15, 1954, and executed by Ernest H. Gustafson and Robert H. Renshaw and filed in the office of the United States Commissioner of the Cape Nome Recording District, Nome, Alaska as Instrument No. 89848, Volume 229 on Page 199.

This agreement also constitutes a receipt for the above-mentioned Fifteen thousand dollars (\$15,000.00) which satisfies the above-mentioned Second Real and Chattel Mortgage.

/s/ WILL M. GILLIS.

On this 30th day of January, 1957, before the undersigned, a Notary Public in and for the Territory of Alaska, personally appeared Will M. Gillis, to me known to be the same identical person who signed and executed the same as his free and voluntary act and deed.

Witness my hand and notarial seal the day and year in this certificate first above written.

[Seal]

Notary Public in and for the Territory of Alaska,
Residing at Nome, Alaska.

My commission expires November 10, 1960.

EXHIBIT No. 3-A

Form No. 176

Notice of Marshal's Sale

United States of America,
2nd District of Div—ss.

Public notice is hereby given, that by virtue of a writ of Fieri Facias (or execution), dated June 4, A. D. 1957, issued out of the District Court of the United States for the Second Division District of Alaska on a judgment rendered in said Court, on the 25th day of April A. D. 1957, in favor of Joseph Wallace and against Will M. Gillis I have, on this

18th day of June, A. D. 1957, levied upon the following described personal property, situated in the City of Nome, Cape Nome Precinct and Territory of Alaska, to wit:

That certain promissory note executed by Ernest H. Gustafson and Robert H. Renshaw, d/b/a North Star Bakery, in favor of defendant for the sum of Nineteen Thousand, Eight Hundred fifty-four and 83/100's Dollars, now in possession of the United States Marshall for the Second Division, District of Alaska, together with all of the interest of the said defendant in and to Lot Seven (7) of Block "H" of the Townsite of Nome, Alaska by reason of that certain real and chattel mortgage securing said debt, recorded in the Office of the U. S. Commissioner of the Cape Nome Precinct, Second Division of Alaska, as instrument No. 89,849.

and that I will, accordingly, offer said personal property for sale, at public venude to the highest and best bidder, for cash, on the 28th day of June, A.D. 1957, at 10:00 o'clock a.m., at United States Marshal's Office, Room 12, Post Office Building, Nome, Alaska.

Dated: June 18th, A.D. 1957.

ROBERT A. PARRISH,
Fairbanks, Alaska,
Plaintiff's Attorney.

ROBERT W. OLIVER,
U. S. Marshal, 2nd Div. Dis-
trict of Alaska.

By /s/ GEORGE A. BAYER,
Chief Deputy.

EXHIBIT No. 4

Satisfaction of Second Real and Chattel Mortgage

Know All Men by These Presents: That the following described property situated in the Cape Nome Recording District, Territory of Alaska, to wit:

All of Lot Seven (7) in Block "H" in the City of Nome, together with all improvements thereon, all building materials to be used from Polet's store on East Front Street.

All bakery equipment and restaurant furnishings, as well as all supplies belonging to the North Star Bakery

is hereby released and discharged from the lien of that certain Second Real and Chattel Mortgage dated September 15, 1954, made and executed by Ernest H. Gustafson and Robert H. Renshaw doing business under the name of North Star Bakery of Nome, Alaska, Mortgagors, to Will M. Gillis, Mortgagee, and given to secure the payment of the indebtedness evidenced by that certain promissory

note in the principal sum of Nineteen thousand eight hundred fifty-four dollars and eighty-three cents (\$19,854.83) with interest at 8% per annum, dated September 15, 1954, and executed by Ernest H. Gustafson and Robert H. Renshaw and filed in the office of the United States Commissioner of the Cape Nome Recording District, Nome, Alaska as Instrument No. 89848. Volume 229, Page 199.

In Witness Whereof, Will M. Gillis has executed this instrument this 30th day of January, 1957.

Executed in the presence of:

/s/ WILL M. GILLIS,

/s/ JAMES G. MANNING,

/s/ BEVERLY A. MORGAN.

Territory of Alaska, Second Division,
Cape Nome Precinct—ss.

On this 30th day of January, 1957, before the undersigned, a Notary Public in and for the Territory of Alaska, personally appeared Will M. Gillis, to me known to be the same identical person who signed and executed the foregoing Satisfaction of Second Real and Chattel Mortgage, and acknowledged to me that he signed and executed the same on the day said release bears date as the free and voluntary act and deed of the Mortgagee, Will M. Gillis.

Witness my hand and notarial seal the day and year in this certificate first above written.

[Seal] /s/ BEVERLY A. MORGAN,
Notary Public in and for the Territory of Alaska,
Residing in Nome, Alaska.

My commission expires November 10, 1960.

EXHIBIT No. 5

To: The United States Marshal for the Second
Judicial Division of the Territory of Alaska,
or any Deputy.

Third Party Claim

United States of America,
Territory of Alaska—ss.

Ernest H. Gustafson, being first duly sworn,
deposes and says:

That I am one of the partners of the partnership known and doing business in Nome, Alaska, as North Star Bakery, and I make this affidavit in good faith as a third party claimant under the statutes of the Territory of Alaska.

That the said partnership purchased in good faith and for a valuable consideration from Will M. Gillis, of Nome, Alaska, the then owner thereof, that certain installment promissory note dated September 15, 1954, in the principal sum of \$19,854.83,

and executed by myself and Robert H. Renshaw, Co-partners, d/b/a North Star Bakery, Nome, Alaska, and now held by you and noticed for sale at 10 a.m. on the 28th day of June, 1957, which said note was secured by a second real and chattel mortgage of record in the office of the ex officio Recorder for the Cape Nome Precinct, Nome, Alaska.

That the said note is of the value of Fifteen Thousand Dollars (\$15,000.00), and that its full satisfaction and the said partnership's right to possession of it is evidenced by the release and satisfaction of second mortgage, executed by the said former owner, Will M. Gillis, and recorded in the office of the said ex officio Recorder, on the 31st day of January, 1957, as instrument number 90533.

That the right of the United States Marshal to hold and execute upon said installment promissory note, which is not yet due, and which prior to judgment or execution has been fully satisfied by the makers, is hereby challenged.

That the said partnership has the right to possession of the said installment promissory note.

/s/ ERNEST H. GUSTAFSON.

Subscribed and Sworn to before me this 26th day of June, 1957.

[Seal] /s/ JAMES A VON DER HEYDT,
Notary Public for Alaska.

My commission expires December 11, 1959.

EXHIBIT No. 6

Civil No. 4107

Re:

JOSEPH WALLACE,

Plaintiff,

vs.

WILL M. GILLIS,

Defendant.

ASSIGNMENT AND BILL OF SALE

I hereby certify that by virtue of a Writ of Execution issued in the above-entitled case I did, on the 29th day of June, 1957, sell, at public auction, to Joseph Wallace, the plaintiff in the above-entitled action: "That certain promissory note executed by Ernest H. Gustafson and Robert H. Renshaw, d/b/a North Star Bakery, in favor of the defendant herein for the sum of Nineteen Thousand Eight Hundred Fifty-four and 83/100 Dollars, said note then being in possession of the United States Marshal for the Second Division, District of Alaska; together with all of the interest of the said defendant in and to Lot Seven (7), of Block "H" of the Townsite of Nome, Alaska, by reason of that certain real and chattel mortgage securing said debt, recorded in the Office of the U. S. Commissioner of the Cape Nome Precinct, Second Division of Alaska as instrument No. 89,849."

Plaintiff's bid in the amount of \$11,225.00 being the highest and best bid received.

Provided, that said sale shall be subject to redemption as provided by law.

Dated at Nome, Alaska this 11th day of June, 1957.

ROBERT W. OLIVER,
United States Marshal, 2nd
Division, District of Alaska.

[Seal] By /s/ GEORGE A. BAYER,
Chief Deputy Marshal.

EXHIBIT No. 7

Notice

Notice is Hereby Given by the parties undersigned, Ernest H. Gustafson and Robert H. Renshaw, partners, d/b/a North Star Bakery, and Miners and Merchants Bank of Alaska, Nome, Alaska, that they intend to redeem from Joseph Wallace any and all interest of Will M. Gillis or themselves in and to that certain Promissory Note and interest in real property more particularly described as a note in the sum of Nineteen Thousand Eight Hundred Fifty-four and 83/100 (\$19,854.83) Dollars and all of the interest of the said Will M. Gillis or themselves in and to Lot 7 in Block H of the townsite of Nome, Alaska, which said property was sold by the U. S. Marshal of the Second Division of Alaska, at Nome, on the 29th day of June, 1957, upon a certain judgment of

Joseph Wallace, Plaintiff, vs. Will M. Gillis, Defendant, civil cause No. 4107.

Redemption is made under and by reason of the following claims, to wit:

That the redeemers hereunder signed all are junior or senior lienholders of and to the said property and are assignors of the interest of the said Will M. Gillis in and to the said property and assignors of that certain real and chattel mortgage recorded in the office of the U. S. Commissioner of the Cape Nome Precinct, 2nd Division, Alaska, as instrument number 89849 by reason of purchase and/or assignment.

In Witness Whereof, the parties hereto have hereunto set their hands this 13th day of July, 1957.

Executed in the presence of:

/s/ JAMES A. VON DER HEYDT,
Nome, Alaska.

/s/ ERNEST H. GUSTAFSON,

/s/ ROBERT H. RENSHAW,
Partners, d/b/a North Star
Bakery.

MINERS & MERCHANTS
BANK OF ALASKA,

By /s/ JAMES G. MANNING,
Executive Vice President.

United States of America,
Territory of Alaska—ss.

This Is to Certify that, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared Ernest H. Gustafson, Robert H. Renshaw, partners, d/b/a North Star Bakery, and James G. Manning, Executive Vice President of the Miners and Merchants Bank of Alaska, Nome, Alaska, to me known personally and known to be the identical individuals named in and who executed the foregoing instrument and each acknowledged to me that he did so freely and voluntarily, for the uses and purposes therein mentioned and specified.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal this 13th day of July, 1957.

/s/ JAMES A. VON DER HEYDT,
Notary Public for Alaska.

My commission expires: 12-11-59.

EXHIBIT No. 8

Certificate of Redemption

Know all men by these presents that I, Joseph Wallace, owner and holder of a Marshal's Assignment and Bill of Sale, a copy of which is attached hereto, do certify that on this 18th day of July,

1957, I received from Ernest H. Gustafson and Robert H. Renshaw, co-partners, d/b/a North Star Bakery, and Miners and Merchants Bank of Nome, Alaska, the sum of Eleven Thousand Two Hundred Twenty-Five (\$11,225.00) Dollars in full redemption of all the right, title and interest of Joseph Wallace in and to the property described in the Marshal's Assignment and Bill of Sale, a copy of which is attached hereto, from the sale thereof made by the said Marshal on the 29th day of June, 1957, all of which and the return of said sale is now on file in the office of the Clerk of the District Court for the Territory of Alaska for the Second Division, Nome, Alaska; that said redemption is made according to the Notice of Redemption, a copy of which is attached hereto and marked "Exhibit B."

Dated this 18th day of July, 1957.

/s/ JOSEPH WALLACE.

State of Washington,
County of King—ss.

This Is to Certify that before me, the undersigned, a Notary Public in and for the State of Washington, County of King, duly commissioned and sworn, personally appeared Joseph Wallace, known to me and known to be the identical individual named in and who executed the foregoing instrument, and he acknowledged to me that he

signed the same freely and voluntarily for the uses and purposes therein mentioned and specified.

In Witness Whereof, I have hereunto set my hand and Notarial Seal this 18th day of July, 1957.

[Seal] /s/ BRADLEY DALTON,
Notary Public in & for the State of Washington.
County of

My comm. expires: July 21, 1957.

EXHIBIT No. 9

Assignment

Know All Men by These Presents:

That, We, Ernest H. Gustafson, Elizabeth Gustafson and Robert H. Renshaw, partners, d/b/a North Star Bakery, Nome, Alaska, for and in consideration of the sum of One Thousand Dollars, and other good and valuable considerations, the receipt of which is hereby acknowledged, and to us paid and delivered by the Miners and Merchants Bank of Alaska, Nome, Alaska, an Alaskan banking corporation, do by these presents sell, convey and assign, transfer and set over unto the said Miners and Merchants Bank of Alaska all of our right and interest, whatever such may be, in and to an existing right of action against Will M. Gillis of Nome, Alaska, or Gillis Construction Company, Inc., Nome, Alaska, based upon a certain installment promissory

note dated September 15, 1954, in the principal sum of \$19,845.83, which said note was purchased by us and again later redeemed from a judgment creditor of the said Will M. Gillis for the redemption sum of \$11,225.00.

To Have and to Hold unto the said Miners and Merchants Bank of Alaska, Nome, Alaska, and to its assigns forever.

In Witness Whereof, we have hereunto set our hands this 7th day of October, 1957.

NORTH STAR BAKERY,
A Partnership,

By /s/ ERNEST H. GUSTAFSON,
Partner.

United States of America,
Territory of Alaska—ss.

This is to certify that on this 7th day of October, 1957, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared Ernest H. Gustafson, a partner of the North Star Bakery, a partnership, Nome, Alaska, and to me known to be the identical person named in and who executed the foregoing assignment, and he acknowledged to me that he executed the same freely and voluntarily for the said partnership, and for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above set forth.

[Seal] /s/ JAMES A. VON DER HEYDT,
Notary Public for Alaska,

My commission expires:

[Endorsed]: Filed April 14, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S REPLY TO DEFENDANT'S
COUNTER-CLAIM

In reply to defendant's first counter-claim plaintiff admits, denies and alleges as follows:

1.

Admits the allegations of paragraph 1 of defendant's first counter-claim.

2.

Admits the allegations of paragraph 2 of defendant's first counter-claim.

3.

Admits the allegations of paragraph 3 of defendant's first counter-claim.

4.

Admits the allegations of paragraph 4 of defendant's first counter-claim.

5.

(a) Admits the allegations of paragraph 5(a) of defendant's first counter-claim.

(b) Admits the allegations of paragraph 5(b) of defendant's first counter-claim.

(c) (d) & (e) Not having sufficient knowledge or information upon which to base a belief of the allegations contained in paragraph 5(c), 5(d) and 5(e), plaintiff denies the same.

6.

Plaintiff admits the allegations of paragraph 6 of defendant's first counter-claim.

7.

Plaintiff admits that part of paragraph 7 of defendant's first counter-claim which states, "the plaintiff knew that the note was not in his possession, but had been attached by the United States Marshal," but denies each and every other allegation contained in said paragraph 7.

8.

Admits that the matters set forth in paragraph 8, are in fact a part of the judgment entered in the case of Wallace vs. Gillis on the 25th day of April, 1957.

9.

Admits the allegations of paragraph 9 of defendant's first counter-claim.

10.

Denies each and every allegations contained in paragraph 10 of defendant's first counter-claim.

11.

Not having sufficient knowledge and information upon which to base a belief of the allegation contained in paragraph 11 of defendant's first counter-claim, plaintiff therefore denies the same.

12.

Admits the sale and Marshal's "assignment and Bill of Sale" of the property described in paragraph 12 defendant's first counter-claim.

13.

Not having sufficient knowledge or information upon which to base a belief of the allegations of paragraph 13 of defendant's first counter-claim.

14.

Not having sufficient knowledge and information upon which to base a belief of the allegations of paragraph 14 of defendant's first counter-claim, plaintiff therefore denies the same.

15.

Not having sufficient knowledge and information upon which to base a belief of the allegations of paragraph 15 of defendant's first counter-claim, plaintiff therefore denies the same.

16.

Not having sufficient knowledge and information upon which to base a belief of the allegation of paragraph 16 of defendant's first counter-claim, plaintiff therefore denies the same.

17.

Denies each and every allegation of paragraph 17 of defendant's first counter-claim.

Plaintiff's Reply to Defendant's Second Counter-Claim

1.

Plaintiff realleges and incorporates herein by reference his replies to paragraphs 1 to 16 of defendant's first counter-claim.

2.

Denies the allegations contained in paragraph 2 of defendant's second counter-claim.

3.

That the allegations contained in paragraph 3 of defendant's second counter-claim are so indefinite that plaintiff cannot frame a responsive pleading thereto, and therefore plaintiff denies the same.

4.

Not having sufficient knowledge and information upon which to base a belief of the allegation of paragraph 4 of defendant's second counter-claim, plaintiff denies the same.

5.

Denies the allegations of paragraph 5 of defendant's second counter-claim.

Reply to Third Counter-Claim

1.

Plaintiff realleges and incorporates herein by reference his replies to paragraph 1 to 16 of defendant's first counter-claim and paragraphs 2 and 3 of defendant's second counter-claim.

2.

Denies the allegations of paragraph 2 of defendant's third counter-claim.

3.

Denies the allegations of paragraph 3 of defendant's third counter-claim.

Wherefore, having replied to defendant's first, second and third counter-claim, plaintiff prays for the relief contained in plaintiff's complaint on file herein.

FRED D. CRANE,
TAYLOR & TAYLOR,

By /s/ FRED D. CRANE,
Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed May 1, 1958.

[Title of District Court and Cause.]

DEPOSITION OF JAMES G. MANNING

Nome, Alaska, April 5, 1958

Appearances:

MR. JAMES A. VON DER HEYDT,

Nome, Alaska,

Attorney for Defendant.

Deposition of James G. Manning, a witness of lawful age, taken on behalf of the defendant, pursuant to stipulation filed herein, before Mary C. Diede, Official Court Reporter and Notary Public in and for the Territory of Alaska, at 2:00 p.m., April 5, 1958, in the Federal Building at Nome, Alaska. Mr. James A. von der Heydt, attorney for the defendant, appeared on behalf of the defendant; Mr. Fred D. Crane, attorney for the plaintiff, did not appear.

Mr. von der Heydt: At the beginning of this deposition I would like to state that I am appearing on behalf of the defendant, Miners and Merchants Bank, in the taking of the deposition of James G. Manning, and that this deposition is taken on behalf of the defendant pursuant to stipulation of the parties by and through their attorneys, myself and Mr. Fred D. Crane, which is dated April 3, 1958. The original signed copy of this stipulation has been handed to the Court Reporter. Mr. Crane has stated that it is not his wish to be present and the defendant has agreed to furnish him with a copy of

the deposition. It is also agreed and stipulated between the parties that all objections as to relevancy and materiality of the questions will be reserved to the time of trial.

JAMES G. MANNING

being first duly sworn, on oath deposes and says

Direct Examination

By Mr. von der Heydt:

Q. Will you state your name, please?

A. James G. Manning.

Q. Where is your residence?

A. Nome, Alaska.

Q. Do you hold a position with the Miners and Merchants Bank of Alaska at Nome?

A. Yes, I do.

Q. What is that position?

A. Executive Vice President.

Q. How long have you held this position?

A. A year and three months.

Q. Just generally, Mr. Manning, what are your duties as Executive Vice President of the Bank—first, let me ask you, are you acquainted with Ernest H. Gustafson and Robert H. Renshaw, who operate a partnership business at Nome, Alaska, known as the North Star Bakery?

A. Yes, I am.

Q. How long have you been acquainted with these persons?

A. Approximately five years slightly, and only a year and three months business-wise.

(Deposition of James G. Manning.)

Q. What business dealings, if any, have you had with the North Star Bakery partnership over this period of time, particularly, Mr. Manning, from the time of your assuming duties at the Bank as Executive Vice President?

A. They have had a regular and normal banking business with us and have been borrowing customers.

Q. Mr. Manning, I now hand you a certified copy of what appears to be a certain real and chattel mortgage dated September 15, 1954, between Ernest H. Gustafson and Robert H. Renshaw, doing business as the North Star Bakery, as mortgagors, and the Miners and Merchants Bank as mortgagee. Can you identify this instrument and if so, will you please state what it is?

(The instrument is first handed to the Reporter and marked as Exhibit No. 1 for Identification and then handed to the witness.)

A. Yes. This is a real and chattel mortgage dated September 15, 1954, between Ernest H. Gustafson and Robert H. Renshaw doing business as the North Star Bakery, and the Bank, in the amount of \$38,000.00.

Q. I now hand Exhibit No. 1 for Identification to the Court Reporter and ask her—which the witness has identified—and ask her to mark it as Exhibit No. 1.

(Exhibit No. I for Identification is thereupon marked as Exhibit No. 1.)

(Deposition of James G. Manning.)

Q. This mortgage states that the property therein described was given to the Bank as security for a loan from the Bank to the North Star partnership in the amount of \$38,000.00. Is that correct?

A. Yes.

Q. Was such loan made to the North Star partners and if so, when?

A. What was that question again?

Q. Was such loan made to the North Star partners and if so, when?

A. Yes, it was made; and the date was September 15, 1954.

Q. Was the mortgage of the property therein described given to the Bank by the North Star Partners as security for such loan?

A. Yes, it was.

Q. Do you know Will M. Gills, the plaintiff in civil action No. 4180, Gills v. Miners and Merchants Bank?

A. Yes.

Q. How long have you known him?

A. Approximately four or five years, but had not actual business dealings with him until about a year and three months ago.

Q. Did you have occasion sometime in January, 1957, to meet or confer with Mr. Gillis, Mr. Renshaw and Mr. Gustafson on a business matter?

A. Yes, I did.

Q. If so, when and where did this meeting occur?

A. It would be the latter part of January in the Bank office.

(Deposition of James G. Manning.)

Q. And that would be January, 1957?

A. 1957, yes.

Q. Mr. Gills, Mr. Renshaw, Mr. Gustafson and yourself were present? A. Yes.

Q. What was the purpose of this meeting?

A. We were discussing the refinancing of the North Star obligations to the Bank.

Q. At the time of such meeting were you aware of the fact that the North Star had previously given to Mr. Gillis a second real and chattel mortgage covering the same property given as security for the Bank's first mortgage of September 15, 1954?

A. Yes, I was aware of that.

Q. And the mortgage which has been identified as Exhibit No. 1? A. Yes.

Q. If you recall, would you state how the fact of the existence of this second mortgage came to your attention?

A. I don't recall exactly, except when we took the steps to refinance the North Star obligations it was known to me that the second mortgage must be cleared up to make our first mortgage a good first mortgage.

Q. Was not the date of the execution of the second real and chattel mortgage of the North Star Partnership, September 15, 1954, the same date as the mortgage to the Bank which is identified as Exhibit No. 1?

A. I believe so—it was after the date of the Bank's first mortgage.

Q. What was your understanding of the relative

(Deposition of James G. Manning.)

priorities between these two mortgages; that is, the second real and chattel mortgage given to Mr. Gillis by the North Star partners, and the mortgage which is Exhibit No. 1, given to the Bank by the North Star?

A. I understood we had a valid, a good first mortgage, and that Mr. Gillis' was a second mortgage, junior to the Bank's obligation.

Q. At the conference about which you have testified, which took place late in January, 1957, were there any agreements between and amongst the parties present?

A. Yes. The main purpose of that meeting was to firm up a verbal agreement beforehand between Mr. Gillis, the North Star partners and the Bank, wherein he would be willing to discount his second mortgage for immediate cash.

Q. How much money did he agree to accept as full satisfaction of his second real and chattel mortgage and note secured thereby?

A. \$15,000.00.

Q. And this money was to be paid to Mr. Gillis at that time or very shortly thereafter in cash?

A. At the time the refinancing was completed on the new North Star loan.

(An instrument is then handed to the Reporter and marked as Exhibit No. 2 for Identification.)

Q. I now hand you an instrument which has been marked by the Court Reporter as Exhibit

(Deposition of James G. Manning.)

No. 2 for Identification, which has been entitled "Agreement to Sell" bearing the date January 21, 1957, and which appears to bear the signature of Will M. Gillis. Can you identify this and state what it is?

A. Yes. This is an agreement by Mr. Gillis to sell his right, title and interest in the second mortgage, to the Miners and Merchants Bank.

Q. Does this agreement, Mr. Manning, state the amount of money he is willing to sell the interest in the second real and chattel mortgage for?

A. Yes. The original or unpaid balance of the chattel mortgage is \$19,854.83, and he is willing to sell that for \$15,000.00 cash.

Q. I now hand Exhibit No. 2 for Identification to the Court Reporter and ask that it be marked as Exhibit No. 2.

(Exhibit No. 2 for Identification is thereupon marked as Exhibit No. 2.)

Q. Mr. Manning, returning to Exhibit No. 2, do you know whether the signature on this Exhibit is actually the signature of Mr. Gillis?

A. Yes, it is.

Q. If so, will you please state how you know this? A. I saw him sign it.

Q. What was the occasion, if you know, for the execution of this instrument by Mr. Gillis?

A. We were ready to close the new refinancing on the new mortgage and this is one of the items

(Deposition of James G. Manning.)

that had to be completed prior to the actual completion of the new financing.

Q. Was this instrument executed by Mr. Gillis at the Bank? A. Yes, it was.

Q. And he left it there or delivered it to you there? A. He left it there.

Q. Was the execution of this Exhibit No. 2 by Mr. Gillis to put in writing, as it were, the verbal agreement of the parties? A. Yes.

Q. And that is the agreement to which you have previously testified, that he would accept \$15,000.00 for his interest in the second real and chattel mortgage and the promissory note which it secured?

A. Yes.

Q. In connection with the agreement which has been identified as Exhibit No. 2, was any money paid by the Bank to Mr. Gillis? A. Yes.

Q. How much money was paid to Mr. Gillis?

A. \$15,000.00

Q. Do you remember when it was paid?

A. It would have been a few days after the meeting in my office; it would have been paid, or was paid when the new mortgage was completed and the moneys disbursed.

Q. And this payment was made to him in cash as a result of this agreement? A. Yes, it was.

Q. Do you know of your own knowledge that Mr. Gillis received this money? A. Yes.

Q. As far as you know, did this payment to him of \$15,000.00 constitute full and complete satisfac-

(Deposition of James G. Manning.)

tion of the installment promissory note of the North Star partners?

A. Yes. It was understood and agreed that he was satisfying his second mortgage for that amount of money.

Q. I now hand to the Reporter a document entitled "Assignment" which I ask to be marked as Exhibit No. 3 for Identification.

(A document entitled "Assignment" is thereupon marked as Exhibit No. 3 for Identification by the Reporter.)

Q. Mr. Manning, I now hand you the document entitled "Assignment," Exhibit No. 3 for Identification, which bears the signature of Will M. Gills, and which is dated January 30, 1957. Can you identify this instrument and if so, will you please state what it is?

A. Yes. This is an assignment by Mr. Gillis to the Bank where he sells and delivers all his right, title and interest to the second real and chattel mortgage that he held in the name of Mr. Gustafson and Mr. Renshaw, doing business as the North Star Bakery.

(Exhibit No. 3 for Identification is then handed to the Reporter and marked as Exhibit No. 3.)

Q. Mr. Manning, was Exhibit No. 3 signed in your presence? As far as you can recall?

A. Yes, it was.

(Deposition of James G. Manning.)

Q. And was this also signed in connection with the agreement of Mr. Gillis to accept \$15,000.00 in cash for the property described in the assignment?

A. Yes.

Q. And did not Mr. Gillis deliver this assignment to the Bank? A. Yes, he did.

Q. At the time the \$15,000.00 payment was made to Mr. Gillis, was any agreement made between the North Star partnership and the Bank with respect to this payment?

A. I am not sure of the meaning of that question, but the North Star agreed to pay the amount of money out of the proceeds of the new loan.

Q. Then the payment to Mr. Gillis of the \$15,000.00 constituted a loan from Bank to the North Star partnership? A. Yes, it did.

Q. And it was a part of the entire refinanced loan to the North Star partnership which took place late in January, 1957? A. Yes.

Q. Did the North Star partnership execute any instruments with respect to this \$15,000.00 liability and other refinancing which they received at that time? A. Yes, they did.

Q. What were those instruments, Mr. Manning?

A. A real and chattel mortgage and a real and chattel mortgage note.

Q. By a real and chattel mortgage note, do you mean a promissory note? A. Yes.

Q. And this promissory note was secured by a real and chattel mortgage? A. Yes, it was.

Q. Upon what property was this new real and

(Deposition of James G. Manning.)

chattel mortgage based, or what property was given in security?

A. The present chattel and real property known as the North Star Bakery and Bakery property.

(Exhibit No. 4 for Identification, a document, is so marked by the Reporter.)

Q. Mr. Manning, would you examine Exhibit No. 4 for Identification and, if you can, tell us what it is.

A. It's a real and chattel mortgage dated January 22, 1957, between the North Star Bakery and the Miners and Merchants Bank.

Q. What is the amount covered in this mortgage? A. \$110,000.00.

Q. What is the date of the mortgage?

A. January 22, 1957.

Q. And you stated, Mr. Manning, that at the same time or shortly before the execution of this mortgage, the partners executed a promissory note in the amount of \$110,000.00?

A. Yes; at the same time.

Q. And this mortgage is to secure that note?

A. Yes.

Q. Mr. Manning, will you examine page No. 3 of this document and see where a promissory note is set forth in full, on page No. 3? To the best of your knowledge and information, is this a true and correct copy of the note executed by the North Star partnership in the amount of \$110,000.00?

A. Yes; it is.

(Deposition of James G. Manning.)

(Exhibit No. 4 for Identification is thereupon marked as Exhibit No. 4.)

Q. Will you please explain the circumstances and occasion for the execution of the note which is set forth on page No. 3 of Exhibit No. 4, and the Exhibit, which is the mortgage?

A. It was executed by the partners involved to secure refinancing on their business operation.

Q. The \$110,000.00 obligation secured by the note and mortgage referred to as Exhibit No. 4, were to cover the indebtedness of the North Star partnership to the Bank, is that correct? A. Yes.

Q. Did not that include satisfaction of the North Star's original mortgage in the amount of \$38,000.00? A. Yes; it did.

Q. And also did it not include the \$15,000.00 paid to Mr. Gillis on behalf of the North Star partnership in satisfaction of his second real and chattel mortgage? A. Yes; it did.

Q. And also other additional financing?

A. That is right.

(An instrument entitled "Satisfaction of Real and Chattel Mortgage" dated January 30, 1957, is then marked by the Reporter as Exhibit No. 5 for Identification.)

Q. Mr. Manning, I now hand you Exhibit No. 5 for Identification which is entitled "Satisfaction of Real and Chattel Mortgage" and which is dated January 30, 1957, and which bears your signature.

(Deposition of James G. Manning.)

Will you please state what this is and the circumstances under which it was executed?

A. Yes. This is a full satisfaction and release of the real and chattel mortgage dated September 15, 1954, in the amount of \$38,000.00.

Q. And the mortgage just referred to of September 15, 1954, is that same instrument which is Exhibit No. 1 herein? Is that correct?

A. Yes.

Q. And this was executed by you in satisfaction of that mortgage at the time of the refinanced loan in January, 1957?

A. Yes.

(Exhibit No. 5 for Identification is thereupon marked as Exhibit No. 5.)

Q. With respect to Exhibit No. 5, Mr. Manning, is that your signature upon the instrument?

A. Yes, it is.

Q. Was the original of this instrument filed with the United States Commissioner at Nome?

A. Yes.

Q. And the purpose of this instrument, being Exhibit No. 5, was to fully satisfy the mortgage which is Exhibit No. 1 herein?

A. Yes.

Q. At the time of the payment to Mr. Gillis of the \$15,000.00 about which you have previously testified and the execution and delivery of Exhibits 4 and 5, what was said by Mr. Gillis, if anything, as to the location of the promissory note of September 15, 1954, in the amount of \$19,854.83 from the North Star partners to Mr. Gillis?

(Deposition of James G. Manning.)

A. Mr. Gillis made no mention of the location of the note.

Q. Did Mr. Gillis state either at this time or at any other time or times where the note was located or whether he had possession of it or whether he could deliver it, either to the North Star Partnership or the Bank? A. No; he did not.

Q. At the time of the meeting in late January, 1957, which you have mentioned, between yourself and Mr. Gustafson, Mr. Renshaw and Mr. Gillis, did Mr. Gillis indicate his full understanding of the agreement and transaction which took place with respect to the payment to him of the \$15,000.00?

A. Yes.

Q. Did he say or do anything which would indicate to you that he considered such payment to constitute full and complete satisfaction of the \$19,854.83 note from the North Star to Gillis?

A. Yes. It was understood he was accepting payment for full satisfaction and he signed the release items, release documents.

Q. And you feel certain that at that time it was his understanding, and everyone's understanding, that the \$15,000.00 he received was full satisfaction for the note and his interest in the second real and chattel mortgage and the property secured thereby?

A. Yes. I am sure that was the full agreement.

Q. Do you remember the next occasion, if there was one, that the matter relating to the promissory note between the North Star and Gillis about which you have testified came to your attention?

(Deposition of James G. Manning.)

A. If I recall correctly, it didn't come to my attention again until the Court action between Mr. Wallace and Mr. Gillis, a month or so later.

Q. By that you refer to the case brought by Mr. Joe Wallace against Mr. Will M. Gillis which was tried here in Nome late in February, 1957?

A. Yes.

Q. And it was at that time that this matter again came to your attention, that is, the matter of the note and second real and chattel mortgage?

A. Yes.

Q. And was it at this time that you first learned that the note referred to in the amount of \$19,854.83 was in the possession of the United States Marshal?

A. Yes.

Q. After the conclusion of the Wallace-Gillis suit and at a later date, did you have knowledge that the United States Marshal was going to sell this note and the interest created in the North Star property by the second real and chattel mortgage at the Marshal's sale?

A. Yes. I was informed of that.

Q. What, if you remember, did you or any of the representatives of the Bank do at this time?

A. The Bank's attorney on several occasions discussed the matter with Mr. Gillis' attorney with the idea in mind of coming to some agreement or making some arrangement on the note.

Q. And that was done at that time, was it not, in order to protect the interest of the North Star and the Bank in the note and second real and chat-

(Deposition of James G. Manning.)

tel mortgage which you had previously purchased from Mr. Gillis for \$15,000.00? A. Yes.

Q. And that is the note and second real and chattel mortgage about which you have previously testified? A. Yes.

Q. If you had known at the time of payment of the \$15,000.00 from the Bank to Mr. Gillis, that the note of the North Star to Gillis previously referred to had been attached by the Marshal in the civil action of Wallace vs. Gillis, and was no longer in Gillis' possession or under his control, would your actions with respect to the payment of \$15,000.00 and the refinancing of the North Star's indebtedness and the releasing of the Bank's original mortgage of September 15, 1954, have been the same? A. No; it wouldn't.

Q. If not, what would your actions as representative of the Bank have been?

A. I wouldn't have gone ahead with the closing of the new loan until the note had been secured or the item settled.

Q. Were you aware of the fact that as a result of the Wallace suit against Gillis that Mr. Wallace obtained judgment against Mr. Gillis?

A. Was your question "Am I aware" or "Was I aware"?

Q. Perhaps I had better rephrase the question, because it isn't clear. After the trial of the Wallace-Gillis suit, which was in late February, 1957, were you then aware of the fact that Mr. Wallace had won that suit against Mr. Gillis? A. Yes.

(Deposition of James G. Manning.)

Q. And at the time of the Marshal's sale of the promissory note and the second real and chattel mortgage and the interest in the North Star partnership property therein, were you aware of the fact that this interest and this note were sold to Wallace at the time of the Marshal's sale?

A. Yes.

Q. After the sale by the Marshal to Wallace of this note and second real and chattel mortgage, what communications, if any, did Wallace or his attorney have with any of the Bank representatives with respect to this matter?

A. Mr. Wallace's Fairbanks attorney contacted the Bank's counsel here in Nome regarding the note.

(A document entitled "Notice" is handed to the reporter and marked as Exhibit No. 6 for Identification.)

Q. I now hand you Exhibit No. 6 for Identification, Mr. Manning, and state that this is entitled "Notice" and is dated the 13th of July, 1957, and is signed by Ernest H. Gustafson and Robert H. Renshaw, partners of the North Star Bakery, and by yourself on behalf of the Bank. Can you identify this, and, if so, state what it is?

A. Yes. This is a notice to Mr. Wallace that Mr. Gustafson, Mr. Renshaw, the North Star Bakery, and the Bank intended to redeem or exercise their right to redeem the second mortgage note in question.

(Deposition of James G. Manning.)

Q. And this is the second real and chattel mortgage and note which was referred to earlier in this deposition, and which was sold by the United States Marshal's sale?

A. Yes. Which was purchased by Joe Wallace.

(Exhibit No. 6 for identification is thereupon handed to the reporter and marked as Exhibit No. 6.)

Q. Will you examine Exhibit No. 6, Mr. Manning, and is that your signature upon the document?

A. Yes.

Q. Are those the signatures of Mr. Gustafson and Mr. Renshaw?

A. Yes; they are.

Q. And this notice, which is Exhibit No. 6, was executed by the parties named therein in order to give notice of redemption of the note and mortgage sold at Marshal's sale in the action Wallace vs. Gillis?

A. Yes.

Q. And in satisfaction of judgment in that action of Wallace vs. Gillis?

A. Yes.

Q. Was not this notice delivered to Mr. Wallace and his attorney?

A. Yes.

(A document entitled "Certificate of Redemption" is handed to the reporter and marked as Exhibit No. 7 for Identification.)

Q. I now hand to you, Mr. Manning, Exhibit No. 7 for Identification, which is entitled "Certificate of Redemption," and dated July 18, 1957, contain-

(Deposition of James G. Manning.)

ing the notarized signature of Joseph Wallace. Can you state what that is?

A. Yes. This is Mr. Wallace's certification and receipt that he received payment from Mr. Gustafson, Mr. Renshaw, the North Star Bakery, and the Bank in the amount of \$11,225.00 in full redemption of his right, title and interest in the note which he purchased at the Marshal's sale.

(Exhibit No. 7 for Identification is then handed to the Reporter and marked as Exhibit No. 7.)

Q. Then this Exhibit No. 7, Mr. Manning, is a receipt from Mr. Wallace, in effect, for \$11,225.00 paid to him? A. Yes.

Q. And the certificate was delivered by Mr. Wallace to the Bank and the North Star partnership?

A. Through his attorney to the Bank's attorney, yes.

Q. The amount stated in Exhibit No. 7, of \$11,225.00, who made this payment to Mr. Wallace?

A. The Bank.

Q. How was it made?

A. In cash through the attorneys for the Bank and Mr. Wallace.

Q. And what, if anything, did the Bank receive in exchange for the payment to Mr. Wallace of \$11,225.00?

A. The agreement and receipt and the note itself.

Q. By the note itself, you mean the note from

(Deposition of James G. Manning.)

the North Star partnership to Mr. Gillis, which was referred to before, which was sold at the Marshal's sale? A. Yes.

Q. To the best of your knowledge why was such payment made in exchange for the promissory note referred to in Exhibit No. 7?

A. To be sure that the Bank's interest and the interest of the North Star Bakery were protected.

Q. And it was necessary to redeem in this manner to protect the Bank's refinanced loan in the amount of \$110,000.00, is that correct?

A. Yes.

Q. After Exhibit No. 7 had been executed by Mr. Wallace and had been delivered to the Bank through its attorney, and Mr. Wallace had been paid the \$11,225.00, was anything said to Mr. Gillis about these matters?

A. Yes. We discussed to some length the Bank's position and Mr. Gillis' position in this matter, and asked him to recognize the payment of his judgment as an obligation.

Q. Was he willing to do so?

A. No; he was not.

Q. Did you make every reasonable effort to reach an agreement with Mr. Gillis on this matter?

A. Yes. I talked to him at some length regarding the matter.

Q. And he would do nothing at all, is that correct? A. Yes.

Q. He would not agree to protect the Bank or the partnership in any way, or to do anything that

(Deposition of James G. Manning.)

would bring equity to the situation, in that he had received the money for the promissory note twice. Is that correct?

A. No; he did not or would not make any arrangement to recognize the obligation or his liability in the second payment.

(A document entitled "Assignment of Contract" is handed to the Reporter and marked as Exhibit No. 8 for Identification.)

Q. I now hand you an instrument comprised of two typewritten pages entitled "Assignment of Contract" which is dated March 21, 1957, and bearing the signature of Will M. Gillis. Can you identify this instrument and, if so, will you state what it is?

A. Yes. This is a contract assignment where Mr. Gillis has assigned to the Bank his right and interest in money to become due on the construction contract between himself and the City of Nome where he agreed to construct a two-room addition to the present school building.

(Exhibit No. 8 for Identification is thereupon marked by the Reporter as Exhibit No. 8.)

Q. What moneys, if any, were received by the Bank from the City of Nome under this assignment, which is Exhibit No. 8?

A. We received one draw, which was a progress payment on the contract, and the amount of that payment was approximately \$24,000.00, if I recall correctly.

(Deposition of James G. Manning.)

Q. What was done with such money received and, if you can, include the dates and amounts?

A. If I recall correctly, the latter part of August we received the first draw check in the amount of approximately \$24,000.00. Mr. Gillis and I paid the \$11,000.00 advanced by the Bank on the contract. Then the balance was placed in the form, partly in the form of a cashier's check in the amount of \$11,250.00, and the balance given to Mr. Gillis in cash.

Q. In other words, Mr. Manning, approximately \$11,000.00 was paid to the Bank upon advances made to Mr. Gillis as a loan, is that correct?

A. Yes. \$11,000.00 plus the interest.

Q. And then there is a Bank draft in the amount of \$11,225.00 at the Bank at this time, is that correct?

A. Yes; there is.

Q. Which is a part of these funds?

A. Yes.

Q. And then the balance from the approximately \$24,000.00 which the Bank received, was given to Mr. Gillis in cash?

A. That is correct.

Q. As far as you can remember, Mr. Manning, did these transactions take place at approximately the same date; that is, the credit of \$11,000.00 upon the indebtedness to the Bank, and the making out of the cashier's check of \$11,225.00, and the payment to Mr. Gillis of the balance—was that not done at approximately the same date, or late in August?

A. Yes.

Q. You have testified that a cashier's check in the amount of \$11,225.00 was left at the Bank as

(Deposition of James G. Manning.)

part of the money received from the assignment of the contract of Mr. Gillis with the City of Nome. What was done with this check for \$11,225.00?

A. It was held in the Bank, and is still held. Mr. Gillis advised us that he didn't want us to use the money to pay the amount we advanced on the Wallace note, and that he would see his attorney and again contact me at a later date.

Q. Then he gave you instructions just to hold the Bank draft? A. Yes; he did.

Q. Did he ever come back to discuss the matter with you? A. No.

Q. Do you still hold the bank draft in its original form? A. Yes; I do.

(A carbon copy of a cashier's check is then handed to the Reporter and marked as Exhibit 9 for Identification.)

Q. I now hand you, Mr. Manning, Exhibit No. 9 for identification, which appears to be a carbon copy of a cashier's check of the Miners and Merchants Bank. This instrument is entitled "purchaser's receipt" and bears No. 1023, and is dated August 29, 1957, and states that it was purchased by Will Gillis to pay for advance by the Bank on the Wallace judgment, i.e., purchase of the North Star note. This is in the amount of \$11,225.00. Can you identify the instrument and, if so, will you state what it is?

A. Yes. That is a carbon copy of the cashier's check.

(Deposition of James G. Manning.)

Q. That is the cashier's check which you have previously referred to? A. Yes.

Q. That Mr. Gillis instructed you to hold?

A. Yes.

(A document dated October 10, 1957—a photostat—is handed to the Reporter and marked as Exhibit No. 10 for identification.)

Q. Mr. Manning, I hand to you Exhibit No. 10 for Identification, which appears to be a photostatic copy of a letter addressed to the Miners and Merchants Bank dated October 10, 1957, and signed by Will M. Gillis. Can you identify this and, if so, would you state what it is?

A. Yes. This is a copy of a letter of demand by Mr. Gillis to the Bank wherein he demands that we release our assignment of the contract between Mr. Gillis and the City of Nome.

Q. Was this done? A. Yes; it was.

(Exhibit No. 10 for Identification is thereupon marked as Exhibit No. 10.)

Q. From whom did you receive Exhibit No. 10?

A. From Mr. Gillis' attorney.

Q. What acts, if any, did you as an officer of the Bank take with respect to the demand exemplified by Exhibit No. 10?

A. I prepared a release of the assignment.

Q. Was Exhibit No. 10 delivered to you at the Bank? A. Yes; it was.

(Deposition of James G. Manning.)

(Exhibit No. 11 for Identification, a copy of a letter to Mayor Steffen Andersen dated September 3, 1957, was so marked by the Reporter.)

Q. Mr. Manning, I now hand you Exhibit No. 11 for Identification. Will you examine it, please, and state what it is, if you can?

A. Yes. It's a letter of release to Mayor Andersen, signed by myself on behalf of the Bank, wherein the Bank releases our right to the assignment of the balance of the proceeds due on Mr. Gillis' contract in an approximate amount of \$13,000.00.

(Exhibit No. 11 for Identification is thereupon marked as Exhibit No. 11.)

Q. This is Exhibit No. 11 which you have identified. Was this prepared and delivered to the City as a result of the demand made by letter which is Exhibit No. 10? A. Yes.

Q. And its purpose and effect was to release the balance then due Mr. Gillis under the terms of the contract, his contract, with the City of Nome?

A. Only the balance, yes.

Q. As far as you know, were the balance payments made to Mr. Gillis?

A. I don't really know. Those payments didn't come through the Bank.

Q. After the Bank had paid Mr. Wallace the \$11,225.00 as a redemption, it was then that you talked this matter over with Mr. Gillis?

(Deposition of James G. Manning.)

A. Yes.

Q. And the date of this conversation with Mr. Gillis would be the date of the copy of the cashier's check which is Exhibit No. 9, is that correct? As far as you know?

A. Yes; as near as I can remember, within a day or two of the date of that check.

Q. And the date of Exhibit No. 9 is August 29, 1957, and your conversation with Mr. Gillis at that time would be approximately that date or very near to it, is that correct? A. Yes.

Q. At the time Mr. Gillis' attorney brought the demand letter, which is Exhibit No. 10, to you, did he say anything in regards, if you know, to the \$11,225.00?

A. Mr. Crane did mention that he would like for us to apply that money to the mortgage loan.

Q. That is a prior mortgage loan of the Bank to Mr. Gillis?

A. Yes, of Mr. Gillis' obligations to the Bank.

Q. And that prior mortgage loan is still outstanding? A. Yes; it is.

Q. Was anything said at any time by Mr. Gillis to you or, to your knowledge, to any officers of the Bank, as to the necessity of Mr. Gillis having the \$11,225.00 paid to him at that particular time for any particular purpose? A. No.

Q. Did Mr. Gillis at any time state to you or, to your knowledge, to any officers of the Bank that he had building materials to ship from Seattle to Nome and needed money for such purpose?

(Deposition of James G. Manning.)

A. No; he didn't.

Q. Was anything else ever said by Mr. Gillis as to what disposition should be made of the \$11,-225.00? A. No.

Q. I have no further questions.

/s/ JAMES G. MANNING.

Certificate

This is to certify that the foregoing pages numbered 1 to 25, inclusive, contain a full, true and accurate transcript of the deposition of James G. Manning held before me in Nome, Alaska, on April 5, 1958, in cause No. 4180; and that Exhibits 1 to 11, inclusive, were attached by me to the original;

That prior to the deposition the witness was sworn under oath administered by me;

That I thereafter reported such deposition in stenograph machine shorthand and prepared the foregoing transcript from my original notes to the best of my knowledge and ability;

That I am not related to nor employed by any of the parties hereto, nor their counsel, and that I am not personally interested in the outcome of these proceedings;

That James G. Manning in my presence signed the original of this deposition on the 10th day of April, 1958, and that such original was thereafter

delivered, sealed and marked as to its contents, to the Clerk of the District Court at Nome, Alaska.

Dated at Nome, Alaska, this 10th day of April, 1958.

Witness my hand and notarial seal hereto affixed.

[Seal] /s/ MARY C. DIEDE,

Notary Public for the
Territory of Alaska.

My Commission expires October 24, 1960.

EXHIBIT No. 5

Satisfaction of Real and Chattel Mortgage

Know All Men by These Presents: That the following-described property situated in the Cape Nome Recording District, Territory of Alaska, to wit:

All of Lot Seven (7) in Block "H" according to the official plat of the Townsite of Nome, Alaska, together with the concrete basement already constructed thereon, and the two-story frame building that is about to be acquired and built on said concrete basement and all building materials to be used in the construction of said building now being assembled by the tearing down of the old A. Polet store at the east end of town.

1 Chevrolet $\frac{3}{4}$ ton Truck, Serial No. 6K1707-11141, Motor No. 3545926. All merchandise consisting of bakery and restaurant supplies, including meats, extracts, etc., used in the making of bakery goods or in serving meals, now owned or later acquired, part of which are now stored in a storehouse situated on Lot Fourteen (14) in Block Twenty-one (21) and in the basement of the Breakers Bar at Lot Four (4) in Block "H," and in the Lomen Commercial Company warehouse on their dock property at the West end of the City of Nome.

All furniture, fixtures and equipment now owned or later acquired and installed in the building at Lot Seven (7) in Block "H."

is hereby released and discharged from the lien of that certain Real and Chattel Mortgage dated September 15, 1954, made and executed by Ernest H. Gustafson and Robert H. Renshaw, a partnership doing business under the firm name and title of North Star Bakery, Mortgagors, and the Miners and Merchants Bank of Alaska, a corporation, Mortgagee, and given to secure the payment of the indebtedness evidenced by that certain promissory note in the principal sum of thirty-eight thousand dollars (\$38,000.00) with interest at 8% per annum, dated September 15, 1954, and executed by Ernest H. Gustafson and Robert H. Renshaw and filed in the office of the United States Commissioner of the Cape Nome Recording District, Nome, Alaska,

as Instrument No. 89668, Volume 229, Pages 199-202.

In Witness Whereof, the Miners and Merchants Bank of Alaska has executed this instrument this 30th day of January, 1957.

MINERS AND MERCHANTS
BANK OF ALASKA,

By /s/ JAMES G. MANNING,
Executive Vice President.

Executed in the presence of:

/s/ BEVERLY A. MORGAN,

/s/ WALTER T. HALEY.

Territory of Alaska,
Second Division,
Cape Nome Precinct—ss.

On this 30th day of January, 1957, before the undersigned, a Notary Public in and for the Territory of Alaska, personally appeared James G. Manning, to me known to be the same identical person who signed and executed the foregoing Satisfaction of Real and Chattel Mortgage, and acknowledged to me that he signed and executed the same on the day said release bears date as the free and voluntary act and deed of the Mortgagee, Miners and Merchants Bank of Alaska.

Witness my hand and notarial seal the day and year in this certificate first above written.

[Seal] /s/ BEVERLY A. MORGAN,
Notary Public in and for the Territory of Alaska,
Residing in Nome, Alaska.

My commission expires November 10, 1960.

Admitted April 5, 1958.

EXHIBIT No. 8

Assignment of Contract

The undersigned, Will M. Gillis (hereinafter called "Assignor"), with his principal place of business at Nome, Alaska, for and in consideration of the sum of \$1.00 and other good and valuable consideration to him paid by the Miners and Merchants Bank of Nome, Alaska (hereinafter called "Bank"), receipt whereof is hereby acknowledged, does hereby transfer, set over and assign unto said bank, its successors and assigns, any and all amounts now due or owing, or which may hereafter be or become due or owing, or remain unpaid at any time or times by the City of Nome, Nome, Alaska, to Assignor under or pursuant to the terms of that certain contract (and any amendments and supplements thereto) entered into by and between the undersigned Assignor and City of Nome, described as follows:

That certain Agreement, dated March 20th, 1957, by and between the City of Nome, Alaska, a municipal corporation organized and existing under the laws of the Territory of Alaska, and Will M. Gillis of Nome, Alaska, by the terms of which the Assignor has agreed to

“construct a two-room addition to the present old Nome public school building, as per plans before the City Council of the City, at its meeting of December 28, 1956, known and identified as Sheet No. 1, Nome Public School Building proposed addition, dated December 19, 1956, and, Sheet No. 2, Nome Public School Building proposed addition, dated December 20, 1956,”

has agreed to pay Assignor the sum of \$41,113.72 and the Undersigned Assignor does hereby designate and appoint said Bank, its successors and assigns, its true and lawful attorney or attorneys, with power irrevocable, for him, and in his name, place and stead to ask, demand, receive, receipt and give acquittance for any and all amounts which may become due or payable by the City of Nome, Alaska, under said contract or any amendments or supplements thereto, and in its discretion to file any claim or to take any other action or proceeding, either in its own name, or in the name of the undersigned, or otherwise, which to said Bank or any successor or assignee thereof may seem necessary or desirable in order to collect or enforce the payment of any and all amounts which may become due or owing

on account of said contract, or any amendments or supplements thereto.

Assignor does hereby represent and warrant unto said Bank that no payments have been made on account of said contract except as follows: No Dollars and that Assignor has not heretofore and will not hereafter alienate nor assign said contract or any right or interest therein or thereto.

The acceptance of this assignment by said Bank shall not obligate it to perform any duty, covenant or condition required to be performed by assignor under and by virtue of said contract or any amendments or supplements thereto.

This assignment is made and entered into to secure and provide for the payment of any and all obligations now due or owing or which may hereafter be or become due or owing by the undersigned Assignor to the Bank.

In Witness Whereof, the Assignor has caused this instrument to be duly executed this 21st day of March, 1957.

/s/ WILL M. GILLIS,
Assignor.

The above assignment is agreed to and accepted by the City of Nome.

/s/ STEFFEN ANDERSEN,
Mayor.

United States of America,
Territory of Alaska—ss.

On this 21st day of March, 1957, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared Will M. Gillis, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal hereto affixed the day and year in this certificate above written.

[Seal] /s/ FRED D. CRANE,

Notary Public in and for the
Territory of Alaska.

My Commission expires October 15, 1960.

Admitted April 5, 1958.

EXHIBIT No. 9

Not Negotiable.

Purchaser's Receipt
Retain for Your Records
Miners and Merchants Bank
of Alaska

1023

Purchased by: Will Gillis to pay for advance by
bank on Wallace Judgment, i.e., purchase of
North Star note.

Nome, Alaska,

August 29, 1957. 59-11

Payable to: Miners & Merchants Bank of Alaska—
\$11,225.00.

M. and M. Bank of Alaska: \$11,225 and 00 Cts.

Memorandum

Cashier's Check for:

/s/ JAMES G. MANNING.

Admitted April 5, 1958.

EXHIBIT No. 10

Nome, Alaska,

October 10th, 1957.

Miners and Merchants Bank,
Nome, Alaska.

Attention Mr. Manning.

Gentlemen:

On or about the 21st day of March, 1957, an assignment of Contract between Will M. Gillis and the City of Nome was made to you.

Demand is now made upon you to forthwith return the said assignment to me or to my Attorney, Fred D. Crane, and you are requested to notify the City of Nome of your action.

/s/ WILL M. GILLIS.

Admitted April 5, 1958.

EXHIBIT No. 11

Miners and Merchants Bank of Alaska

Established 1904

Nome, Alaska,

September 3, 1957.

Hon. Mayor Steffen Andersen,
City of Nome,
Nome, Alaska.

Dear Sir:

Reference is made to the contract between the City of Nome and Will M. Gillis wherein Mr. Gillis agrees to construct an addition to the Nome School in the amount of \$41,113.72. This contract was assigned to this bank on the 21st of March, 1957.

Please accept this letter as our release of all rights under the above-mentioned assignment to the balance of the proceeds due in the approximate amount of \$13,000.00. By this notice we only intend to release the balance that is due and unpaid Mr. Gillis.

Yours very truly,

/s/ JAMES G. MANNING,

Executive Vice President.

JGM/bm.

cc: City Clerk.

Admitted April 5, 1958.

[Endorsed]: Filed April 11, 1958.

[Title of District Court and Cause.]

STIPULATION FOR TAKING OF DEPOSITION
UPON ORAL EXAMINATION OF
JAMES G. MANNING

It is stipulated between plaintiff and defendant that the deposition of James G. Manning may be taken upon oral examination before a notary public for the Territory of Alaska, or before some other officer authorized by law to take depositions, at Federal Building, Nome, Alaska, at 2:00 p.m., for the purpose of discovery or use as evidence by either party in the above action or for both purposes, on April 5, 1958.

Dated: April 3, 1958.

/s/ FRED D. CRANE,
Attorney for Plaintiff.

/s/ JAMES A. von der HEYDT,
FAULKNER, BANFIELD &
BOOCHEVER,

/s/ JOHN H. DIMOND,
Attorneys for Defendant.

[Endorsed]: Filed April 11, 1958.

[Title of District Court and Cause.]

DEPOSITION OF ERNEST H. GUSTAFSON

Nome, Alaska,
April 5, 1958.

Appearances:

MR. JAMES A. von der HEYDT,
Nome, Alaska,
Attorney for Defendant.

Deposition of Ernest H. Gustafson, a witness of lawful age, taken on behalf of the defendant, pursuant to stipulation filed herein, before Mary C. Diede, Official Court Reporter and Notary Public in and for the Territory of Alaska, at approximately 3:30 p.m., April 5, 1958, in the Federal Building at Nome, Alaska, Mr. James A. von der Heydt, attorney for the defendant, appeared on behalf of the defendant; Mr. Fred D. Crane, attorney for the plaintiff, did not appear.

Mr. Von Der Heydt: At the beginning of this deposition I would like to state that I am appearing on behalf of the defendant, Miners and Merchants Bank, in the taking of the deposition of Ernest H. Gustafson, and that this deposition is taken on behalf of the defendant pursuant to stipulation of the parties by and through their attorneys, myself and Mr. Fred D. Crane, which is dated April 3, 1958. The original signed copy of this stipulation has been handed to the Court Reporter. Mr. Crane has stated that it is not his wish to be present and the defend-

ant has agreed to furnish him with a copy of the deposition. It is also agreed and stipulated between the parties that all objections as to relevancy and materiality of the questions will be reserved to the time of trial.

ERNEST H. GUSTAFSON

being first duly sworn, on oath, deposes and says:

Direct Examination

By Mr. Von Der Heydt:

Q. Will you state your name, please?

A. Ernest H. Gustafson.

Q. And where do you reside?

A. At Nome, Alaska.

Q. Are you one of the partners in the co-partnership doing business at Nome, Alaska, under the name of North Star Bakery and Hotel?

A. Yes; I am.

Q. When was this partnership formed?

A. 1951.

Q. Where was it formed?

A. At Nome, Alaska.

Q. What is its business?

A. Its business, the North Star Bakery and Grill, Breakers Bar and the North Star Hotel.

Q. Who are the other partners?

A. Robert H. Renshaw, and my wife, Elizabeth W. Gustafson.

Q. I now hand to the Reporter Exhibit No. 1 for Identification and ask her to mark it as such.

(Deposition of Ernest H. Gustafson.)

(A document entitled "Installment Promissory Note" is then marked by the Reporter as Exhibit No. 1 for Identification.)

Q. Now, Mr. Gustafson, I hand you a document which is marked Exhibit No. 1 for identification, which appears to be an installment promissory note, dated September 15, 1954, in the principal sum of \$19,854.83, and which appears to have been signed by you and by your partner, Mr. Renshaw. Can you identify this instrument and, if so, will you state what it is?

A. This is an installment promissory note to secure a real and chattel mortgage on the North Star Bakery in regards to an amount of money owed Will M. Gillis as a result of a fire we had.

Q. When you say, when you mention a real and chattel mortgage—— A. A second.

Q. You mean that real and chattel mortgage was given to secure this note? Is that right?

A. That is correct.

Q. And if I understand you correctly, the amount of this note is the amount of loss of Mr. Gillis on account of a fire of the North Star property?

A. That is right.

Q. Approximately when was this fire?

A. The last day of October, 1953.

Q. This instrument, Exhibit No. 1 for Identification, bears your signature?

A. That is correct.

Q. And the signature of Robert H. Renshaw?

(Deposition of Ernest H. Gustafson.)

A. That is right.

Q. And it was executed by you and Mr. Renshaw on the date set forth therein?

A. That is right.

Q. What was that date?

A. September 15, 1954.

(Exhibit No. 1 for Identification is thereupon marked as Exhibit No. 1.)

Q. Why was this promissory note executed?

A. To secure an indebtedness we had incurred as a result of a fire.

Q. Was this note delivered to Mr. Gillis?

A. It was.

Q. Was it delivered to him upon the date of its execution? A. It was.

Q. What security, if any, did the North Star partnership give to Mr. Gillis as a result of the indebtedness evidenced by Exhibit No. 1?

A. We gave him a second real and chattel mortgage on the North Star Bakery property and building and contents therein.

(A document entitled "second real and chattel mortgage"—photostat—is marked by the Reporter as Exhibit No. 2 for Identification.)

Q. I now hand you Exhibit No. 2 for Identification which is entitled "Second Real and Chattel Mortgage" and which is dated September 15, 1954. Will you examine this exhibit and tell us what it is, if you know?

(Deposition of Ernest H. Gustafson.)

A. Yes. This is the second real and chattel mortgage to secure Will M. Gillis' interest in the North Star Bakery building and made in regards to the installment promissory note that we signed along with this.

Q. And that installment promissory note is the one which is Exhibit No. 1?

A. That is correct.

Q. At the time of the execution and delivery by you of this second real and chattel mortgage—first, I will hand to the Court Reporter this Exhibit No. 2 for Identification and ask that it be marked as an Exhibit.

(Exhibit No. 2 for Identification is thereupon marked as Exhibit No. 2.)

Q. At the time of the execution and delivery by you of the second real and chattel mortgage which is Exhibit No. 2, to Mr. Gillis, did you also give to the Miners and Merchants Bank a first mortgage of the identical property?

A. That is correct.

Q. Now for what indebtedness was this mortgage to the bank given as security?

A. The first mortgage was given to the Bank in an amount of \$38,000.00.

Q. With respect to Exhibit No. 1, that is the promissory note from you to Gillis in the amount of \$19,854.83, what payments were made, if any, by you to Gillis on that obligation?

(Deposition of Ernest H. Gustafson.)

Q. There were no installments due on the promissory note until September 15, 1957, I believe.

Q. Was any interest paid?

A. There was interest paid.

Q. Do you know the amounts and dates of such payments?

A. Offhand I couldn't give you the correct dates.

Q. What was the approximate amount paid?

A. There was one amount paid of approximately \$2,400.00, at one time.

Q. Did you have occasion to be present at a meeting held in the offices of the Miners and Merchants Bank at Nome on or about the 30th day of January, 1957, at which meeting were present besides yourself, Mr. Renshaw, Mr. James G. Manning, and Mr. Will M. Gillis? A. Yes.

Q. What was the purpose of this meeting?

A. The purpose of this meeting was to clear off the second real and chattel mortgage, so arrangements could be made to refinance our operation.

Q. When you refer to a second real and chattel mortgage you refer to the mortgage to Mr. Gillis, which is Exhibit No. 2? A. That is correct.

Q. Which secured the promissory note which is Exhibit No. 1? A. That is correct.

Q. At this meeting what took place and what agreements, if any, were made amongst the parties present?

A. Will M. Gillis agreed to release the second real and chattel mortgage and promissory note for the amount of \$15,000.00, which was paid to him.

(Deposition of Ernest H. Gustafson.)

Q. Did the \$15,000.00 which was paid to Mr. Gillis constitute a loan from the Bank to the North Star partnership? A. That is correct.

Q. And did not Mr. Gillis execute a satisfaction of his second real and chattel mortgage and an assignment of his interest in that to the Bank?

A. He did.

(A document entitled "Satisfaction of Second Real and Chattel Mortgage" is handed to the Court Reporter and marked Exhibit No. 3 for Identification.)

Q. I now hand you, Mr. Gustafson, Exhibit No. 3 for Identification, which is entitled satisfaction of second real and chattel mortgage and which is dated January 30, 1957, and which is signed by Will M. Gillis. If you can, will you identify that and tell us what it is?

A. This is a release and satisfaction of second real and chattel mortgage whereby Will M. Gillis released all interest in the North Star Bakery by our paying him \$15,000.00. In return we were to receive the release on the above.

(Exhibit No. 3 for Identification is then marked as Exhibit No. 3.)

Q. After the satisfaction of the second real and chattel mortgage held by Mr. Gillis, and which is evidenced by Exhibit No. 3, what was the status of the first mortgage from the North Star Bakery partnership to the Miners and Merchants Bank,

(Deposition of Ernest H. Gustafson.)

which had been executed on September 15, 1954, and which secured a loan to the North Star of \$38,000.00? A. Will you repeat that again, sir?

(The reporter thereupon read the previous question.)

A. The first mortgage was still outstanding.

Q. And did it not then remain the only obligation secured by the mortgage of the North Star partnership? A. That is correct.

Q. At the time of the conference on or about January 30, 1957, did you and your partners execute a new mortgage to the Bank to secure the loan of \$15,000.00 plus the balance of the \$38,000.00 and other moneys?

A. Yes; a new one was drawn up.

Q. What was the total amount of the new mortgage? A. \$110,000.00.

Q. What payments were made to Mr. Gillis at this time?

A. Mr. Gillis was paid \$15,000.00 to clear his second real and chattel mortgage that he held on the North Star Bakery building.

Q. Was it the understanding of all parties at this time that this amount of money was full satisfaction of this note and mortgage?

A. It was.

Q. To your recollection, did Mr. Gillis say anything at that time which would indicate his full understanding of this?

(Deposition of Ernest H. Gustafson.)

A. It was agreed that the \$15,000.00 payment would settle it in full.

Q. Was the \$15,000.00 paid to him?

A. It was.

Q. Was this paid in cash? A. Yes; it was.

Q. At the time of the conversation at the Bank on or about January 30, 1957, and about which you have previously testified, did Mr. Gillis make any statements at all which would indicate where the note which has been marked as Exhibit No. 1 was located? A. No; he did not.

Q. Did he say anything at all about the note having been attached by the United States Marshal?

A. No; he did not.

Q. Are you now aware of the fact that at the time these transactions took place said note had been attached by the United States Marshal and was not in Mr. Gillis' possession or under his control? A. We were aware of it at a later date.

Q. If you remember, when and under what circumstances did you first discover this fact?

A. When the Marshal's attachment in the Joe Wallace-Will M. Gillis suit was brought to our attention.

Q. By attachment, you mean the execution, do you not? A. The execution, that is correct.

Q. When you refer to the Wallace-Gillis suit, you refer, do you not, to a civil action which was tried in Nome, in the Nome Court, at the end of February, 1957? In which Mr. Wallace obtained judgment against Mr. Gillis?

(Deposition of Ernest H. Gustafson.)

A. That is correct.

Q. If you had known at the time the transaction took place and at the time Mr. Gillis was paid the \$15,000.00, that the note was attached by the U. S. Marshal and not in Mr. Gillis' possession, would your actions have been different with respect to obligating yourself for an additional \$15,000.00 debt at the Bank? A. Yes; they would have.

Q. What would your actions have been?

A. We would not have paid Will M. Gillis the \$15,000.00 until he was able to produce said note and second real and chattel mortgage.

Q. Do you recall that some time in June, 1957, the United States Marshal posted a notice that he would sell at a definite time and place the promissory note which is Exhibit No. 1 herein, together with all of Mr. Gillis' interest in the North Star property? A. Yes.

Q. Do you recall how this notice was brought to your attention?

A. In the post office on the bulletin board.

Q. That is, you saw it posted?

A. I saw it posted there on the bulletin board.

Q. After you received notice that the Marshal intended to make the sale of this note, what action did you take?

A. We filed a third-party claim.

(A document entitled "Third Party Claim" is handed to the Reporter and marked as Exhibit No. 4 for Identification.)

(Deposition of Ernest H. Gustafson.)

Q. I now hand you, Mr. Gustafson, Exhibit No. 4 for Identification, which is entitled Third-Party Claim and which is dated June 26, 1957. Will you examine this and, if you can, tell us what it is?

A. Yes. This is a Third-Party Claim to protect—filed in order to protect our interest in the North Star Bakery building.

Q. Who was this filed with?

A. It was filed with the United States Marshal.

(Exhibit No. 4 for Identification is thereupon marked as Exhibit No. 4.)

Q. What action, if you know, did the Marshal take with respect to your claim?

A. Joseph Wallace was required to post bond.

Q. Was the note and property then sold by the Marshal pursuant to notice of sale despite the filing of your third-party claim?

A. Yes; it was.

Q. Was this done to satisfy the judgment against Will M. Gillis held by Joseph Wallace?

A. It was.

(Exhibit No. 5 for Identification, a document entitled "Notice," was then so marked by the Reporter.)

Q. Mr. Gustafson, I now hand you Exhibit No. 5 for Identification which is entitled "Notice," which is a copy of an instrument signed by yourself, Mr. Renshaw and the Executive Vice President of the Miners and Merchants Bank. If you can, will you state what this is?

(Deposition of Ernest H. Gustafson.)

A. Yes. This is a notice of redemption that we intended to redeem from Joe Wallace any and all interest of Will M. Gillis of a certain promissory note held by Joe Wallace.

(Exhibit No. 5 for Identification is then marked as Exhibit No. 5.)

Q. Did you execute the document now marked as Exhibit No. 5? A. Yes; we did.

Q. What was your purpose in executing Exhibit No. 5?

A. It was to inform Joseph Wallace that we intended to redeem the second real and chattel mortgage that he held in his possession, and the installment promissory note also.

(Exhibit No. 6 for Identification, a document entitled "Certificate of Redemption," is so marked by the Reporter.)

Q. Mr. Gustafson, I hand you Exhibit No. 6 for Identification which is entitled "Certificate of Redemption" and which is dated July 18, 1957, and signed by Joseph Wallace. Can you identify such and, if so, state what it is?

A. Yes. This is a certificate of redemption showing Joseph Wallace was paid \$11,225.00 in full satisfaction for all his right, title and interest in this second real and chattel mortgage and promissory note.

Q. And those instruments just referred to are the ones here which are Exhibits 1 and 2?

(Deposition of Ernest H. Gustafson.)

A. That is correct.

(Exhibit No. 6 for Identification is thereupon marked Exhibit No. 6.)

(Exhibit No. 7, a document entitled "Assignment," is marked by the Reporter as Exhibit No. 7 for Identification.)

Q. I now hand you Exhibit No. 7 for Identification, which is entitled "Assignment," and which is dated October 7, 1957, and bearing your signature as a partner in the North Star Bakery. Can you identify this instrument and, if so, will you please state what it is?

A. Well, we assign all our right and interest, whatever it may be, in the action against Will M. Gillis of Nome, or Gillis Construction Co. of Nome, upon a certain installment promissory note in the amount of \$19,845.83, which note was purchased by the Bank which note was purchased by us and later redeemed from judgment creditor Joe Wallace in the sum of \$11,225.00.

(Exhibit No. 7 for Identification was then marked as Exhibit No. 7.)

Q. To whom was this assignment made?

A. The Miners and Merchants Bank.

Q. Was this instrument delivered to the Bank?

A. It was.

Q. And is the date appearing upon the instrument and the date of your signature, the actual date of such?

A. Yes; it is.

(Deposition of Ernest H. Gustafson.)

Q. Did you intend by Exhibit No. 7 to transfer to the Bank all of your claims and the receipts of the action against Will M. Gillis with respect to the transaction on the promissory note which is Exhibit No. 1, about which you testified?

A. Yes; we did.

Q. I have no further questions.

/s/ ERNEST H. GUSTAFSON.

Certificate

This is to certify that the foregoing pages numbered 1 to 13, inclusive, contain a full, true and accurate transcript of the deposition of Ernest H. Gustafson, held before me in Nome, Alaska, on April 5, 1958, in cause No. 4180; and that Exhibits 1 to 7, inclusive, were attached by me to the original;

That prior to the deposition the witness was sworn under oath administered by me;

That I thereafter reported such deposition in stenograph machine shorthand and prepared the foregoing transcript from my original notes to the best of my knowledge and ability;

That I am not related to nor employed by any of the parties hereto, nor their counsel, and that I am not personally interested in the outcome of these proceedings;

That Ernest H. Gustafson in my presence signed the original of this deposition on the 10th day of April, 1958, and that such original was thereafter delivered, sealed and marked as to its contents, to the Clerk of the District Court at Nome, Alaska.

Dated at Nome, Alaska, this 10th day of April, 1958.

Witness my hand and notarial seal hereto affixed.

[Seal] /s/ MARY C. DIEDE,

Notary Public for the
Territory of Alaska.

My Commission expires October 24, 1960.

[Endorsed]: Filed April 11, 1958.

[Title of District Court and Cause.]

STIPULATION FOR TAKING OF DEPOSITION
UPON ORAL EXAMINATION OF
ERNEST H. GUSTAFSON

It is stipulated between plaintiff and defendant that the deposition of Ernest H. Gustafson may be taken upon oral examination before a notary public for the Territory of Alaska, or before some other officer authorized by law to take depositions, at Federal Building, Nome, Alaska, on April 5, 1958, at 3:00 p.m., for the purpose of discovery or use as evidence by either party in the above action or for both purposes.

Dated: April 3, 1958.

/s/ FRED D. CRANE,
Attorney for Plaintiff.

/s/ JAMES A. von der HEYDT,
FAULKNER, BANFIELD &
BOOCHEVER,

/s/ JOHN H. DIMOND,
Attorneys for Defendant.

[Endorsed]: Filed April 11, 1958.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Defendant moves the court to enter summary judgment for the defendant in accordance with the relief sought in its answer and counterclaims herein.

This motion is based upon the pleadings in this action, the depositions of James G. Manning and Ernest H. Gustafson heretofore filed herein, and the affidavit of James A. von der Heydt of April 10, 1958, annexed hereto.

This motion will also be supported by a comprehensive brief which will demonstrate that there is no genuine issue as to any material fact and that defendant, as a matter of law, is entitled to judgment on its counterclaims. This brief has been drafted in rough form but could not be completed

until plaintiff had made his replies to defendant's counterclaims. Now that such replies have been served and filed herein, defendant's brief in support of this motion will be completed with dispatch and promptly served and filed in this action.

Dated: May 2, 1958.

/s/ JAMES A. von der HEYDT,
FAULKNER, BANFIELD &
BOOCHEVER,

/s/ JOHN H. DIMOND,
Attorneys for Defendant.

Affidavit

United States of America,
Territory of Alaska—ss.

James A. von der Heydt, being first duly sworn, deposes and says:

I am a resident of Nome, Alaska, and have been such for nearly 14 years. Since March 1, 1953, I have been engaged in the private practice of law at Nome, and since that date have been attorney for the Miners and Merchants Bank of Alaska, Nome, Alaska. Also, from time to time, I have performed legal services for the North Star Bakery, a partnership doing business at Nome, Alaska.

During the time that I was absent from Nome to attend the 1957 Session of the Alaska Legisla-

ture, being January 18, 1957, through April 1, 1957, I received correspondence from Mr. James G. Manning, Executive Vice President of the Miners and Merchants Bank, Nome, to the effect that the bank had been successful in refinancing the loan to the North Star Bakery, Nome, Alaska. The North Star Bakery is a partnership business owned and operated at Nome by the partners, Ernest H. Gustafson, Robert H. Renshaw, and Elizabeth Gustafson. The said business consists of a large two-story frame business building with full concrete basement, resting on Lot 7 in Block H, City of Nome, Alaska.

Shortly after my return to Nome, after the Legislative Session, or during the first week of April, 1957, the matter of the new refinanced loan of the bank to the North Star partnership was called to my attention, and I was asked, as attorney for the bank, to investigate a report that a certain installment promissory note, which had played a part in the refinancing arrangements between the bank and the North Star partnership, was actually held by the U. S. Marshal at Nome, under attachment. The note referred to was that note dated September 15, 1954, which was prepared by myself, and executed in my presence by Ernest H. Gustafson and Robert H. Renshaw, as partners in the North Star partnership hereinabove referred to, and delivered in my presence to Will M. Gillis, of Nome, Alaska, on that date. The said note is an installment promissory note in the principal sum of \$19,854.83. The

Will M. Gillis mentioned above is the same Will M. Gillis who is plaintiff in a civil action, number 4180, in the District Court for the Second Judicial Division of Alaska, Will M. Gillis vs. Miners and Merchants Bank. The said installment promissory note was secured by a Second Real and Chattel Mortgage upon the North Star building and other property, and this second mortgage was executed and delivered to Mr. Gillis in my presence at Nome, on September 15, 1954. The Miners and Merchants Bank of Alaska, Nome, held a prior first mortgage upon the same property, which mortgage was fully satisfied at the time of the refinanced loan referred to first above.

Upon investigation, I found that the actual installment promissory note of September 15, 1954, was in the possession of the United States Marshal, Nome, Alaska, under attachment in a civil action which had been tried in Nome in late February, 1957, in the District Court. This action was Joseph Wallace vs. Will M. Gillis, No. 4107. I further ascertained that the note had been surrendered to the marshal by Mr. Gillis under writ of attachment issued in civil action number 4107 upon the original filing of that suit in the Fall of 1956, and that upon trial in late February, 1957, Mr. Wallace had obtained judgment against Mr. Gillis in a total sum of slightly over \$15,000.00. The marshal also informed me that as far as he knew, he would be asked to sell the said note and the interest secured therein in the North Star property, at marshal's

sale, in order to satisfy the judgment of Mr. Wallace against Mr. Gillis.

At this time I contacted Mr. Fred D. Crane, attorney for Mr. Gillis in the case brought by Joseph Wallace. The first meeting with Mr. Crane was on or about the 20th day of April, 1957, at Mr. Crane's office. I discussed the matter of the attached note with Mr. Crane, and the position of the parties involved, that is, that the North Star partners had purchased, in good faith, the installment promissory note under attachment, from Mr. Gillis, in late January, 1957, for the cash sum of \$15,000.00, and that Mr. Gillis had executed a full satisfaction of the said note and second real and chattel mortgage upon receipt of these funds. I further pointed out to Mr. Crane that the sale of this note at marshal's sale to a third party under the circumstances would force the North Star partners or the Miners and Merchants Bank, as holder of a large refinanced loan to the North Star partnership, to protect their interests. I asked Mr. Crane to discuss this matter with Mr. Gillis in an effort to reach a fair and equitable solution to the problem, and in order that no parties involved would be injured. Mr. Crane agreed to discuss the situation with Mr. Gillis in an effort to reach a solution, and to advise me.

Nearly a month went by, and I did not hear anything from either Mr. Crane or Mr. Gillis.

During the latter part of May, 1957, I again contacted Mr. Crane about the matter which we had

previously discussed, and informed him that insofar as I was able to learn from the office of the U. S. Marshal, at Nome, the said installment note was to be sold at marshal's sale to satisfy the balance due in the Wallace-Gillis judgment in the next few weeks. Mr. Crane did not state anything definite, but indicated in a general way that he had mentioned the matter to Mr. Gillis, but that Mr. Gillis was not willing to take any steps to protect the North Star partners or the bank at this time. I again pointed out to Mr. Crane the serious possible consequences of the situation if the note fell into the hands of a third party at marshal's sale. Mr. Crane said he would see what he could do, but I heard nothing from him.

On or about the 18th day of June, 1957, the U.S. Marshal posted Notice of Sale of the said installment promissory note, together with the interest secured in the property of the North Star partners, Lot 7, Block H, City of Nome, such sale to be held June 28, 1957, at Nome. Again, at this time, I contacted Mr. Crane to see if Mr. Gillis would not take some steps to protect the North Star partners and the bank from whom he had accepted \$15,000.00 in cash for the note now being sold under attachment. Mr. Crane was informed of the date of the sale at that time. Several times in the intervening period of ten days between the posting of Notice by the marshal and the actual sale, Mr. Crane was contacted in an effort to reach a solution which would work no hardship on any party involved. At

no time was any suggested solution offered by Mr. Gillis or his attorney. At one time, before the marshal's sale, I met Mr. Gillis, and since Mr. Crane had previously indicated he would have no objection to my talking to Mr. Gillis myself, I asked Mr. Gillis to discuss the matter of the note sale with me. He refused to do so, and turned and walked away.

Two days prior to the marshal's sale of the said note, I prepared and filed on behalf of the North Star partnership, a Third Party Claim as to the ownership of the installment promissory note to be sold. This Third Party Claim was executed by Ernest H. Gustafson on behalf of the partnership, and filed with the U. S. Marshal, Nome. Mr. Wallace was notified of this claim by the marshal, and he was asked to post bond, which he did.

At the time of the marshal's sale, Mr. Wallace and his attorney, Mr. Robert Parrish, appeared. I was also present, as was Chief Deputy Marshal George A. Bayer. Neither Mr. Gillis nor Mr. Crane were present. At this time, Mr. Wallace bid the sum of \$11,225.00 for the note and interest in the North Star property represented thereby. This sum, \$11,225.00, was the then balance due upon the Wallace-Gillis judgment, and satisfied such in full, together with all costs and fees. The note was later delivered by the marshal to Mr. Wallace's attorney, Mr. Robert Parrish, of Fairbanks.

A few days following the marshal's sale of the said installment note, or approximately on the 6th

or 7th of July, 1957, I received a long distance telephone call from Mr. Parrish, indicating that he and Mr. Wallace had found a buyer for the note purchased at marshal's sale in Nome, and that unless the North Star partners or the bank redeemed, Mr. Wallace would sell the note. I advised Mr. Parrish that I would let him know within two or three days. At that time I again called upon Mr. Crane, and advised him that both the North Star partners and the bank, in order to protect themselves, were in a position of being forced to redeem the note from Mr. Wallace. Mr. Crane stated that Mr. Gillis was not willing to take any steps to assist either the North Star partners or the bank, though no denial was ever made that Mr. Gillis had received \$15,000.00 for full satisfaction of the said note.

Therefore, in order to protect the large refinanced loan of the bank to the North Star, of January, 1957, which because of the circumstances, had become inferior to the Second Real and Chattel mortgage dated September 15, 1954, and delivered to Mr. Gillis to secure the note which was sold at marshal's sale, and to protect the bank and North Star from suit by a third person upon the note, the North Star partners and the bank gave notice of intent to redeem, for the sum of \$11,225.00. This was done, and through funds furnished by the Miners and Merchants bank, the note, secured by the second real and chattel mortgage, was redeemed. Because of the continued financial strain upon the

North Star partnership in their rebuilding program as a result of the fire, the partnership had no funds with which to redeem.

The installment promissory note of September 15, 1954, which was sold to Mr. Wallace at marshal's sale, was delivered to me as attorney for the bank by Mr. Parrish at the time of payment to Mr. Wallace of \$11,225.00, the redemption amount. This payment was made at Mr. Parrish's office in Fairbanks, Alaska, on July 16, 1957.

Some few days after my return to Nome, which was approximately one week after the 16th day of July, 1957, I met Mr. Crane in Nome. Mr. Crane asked me if the bank or the North Star partners had redeemed the note, to which I answered in the affirmative. At this time I again asked Mr. Crane if some agreement could not be reached which would not injure any of the parties involved. Mr. Crane answered that he would talk to Mr. Gillis again sometime, but I was never informed if this conversation took place.

No suggestions were ever made by Mr. Gillis or his attorney as to a possible solution to the difficulty, nor did either ever indicate any desire to hold a conference to discuss the matter. This is the situation which existed at the time of the filing of Mr. Gillis' suit against the Miners and Merchants Bank.

Dated this 10th day of April, 1958, at Nome, Alaska.

/s/ JAMES A. von der HEYDT.

Subscribed and sworn to before me this 10th day of April, 1958, at Nome, Alaska.

[Seal] /s/ ROBERT F. SCOTT,
Notary Public for Alaska.

My commission Expires Oct. 28, 1961.

Receipt of copy acknowledged.

[Endorsed]: Filed May 2, 1958.

[Title of District Court and Cause.]

Affidavit

United States of America,
Territory of Alaska—ss.

Robert A. Parrish, being first duly sworn, upon his oath, deposes and says: That he is an attorney at law and on the 18th day of February, 1957, was duly authorized to practice in the District Court for the District of Alaska, Second Division, and was on said day, or thereabouts, in Nome, Alaska, for the purpose of engaging in the trial of Joseph Wallace vs. Will M. Gillis, No., a case involving a transaction relating to the North Star Bakery, a second mortgage upon said building and land, and a certain promissory note, the indebtedness relating to said mortgage. That at the beginning of said action, as is more particularly evidenced by the records and filed therein, the said

note was attached and the same taken into the possession of the U. S. Marshal of the Second Division, Territory of Alaska, and posting made upon the subject property, to-wit: The North Star Bakery, had been made.

That on the said 18th day of February, 1957, in the company of his client, Joseph Wallace, at approximately the hour of 9:30 in the morning, Affiant and his client went to the office of the U. S. commissioner to check the status of the said second mortgage; that affiant and his client, the said Joe Wallace, were informed by the U. S. commissioner, then on duty, that the said mortgage had been released by the Defendant in the case and from some source it appeared that Miners & Merchants Bank had been a party to the negotiation of the new mortgage between the North Star Bakery and said bank. That thereupon the said Joe Wallace and your Affiant did go to the Miners and Merchants Bank and request to see one Jerry Manning, who your Affiant believes to have been president of the said bank or acting manager, and upon being taken into the office of the said Jerry Manning, Affiant inquired as to the status of the mortgage and payments due thereon. The said Jerry Manning did then and there inform Affiant and his client, Joseph Wallace, that the bank had executed a new mortgage with the North Star Bakery, making arrangements to assimilate in some manner, the exact nature of which your Affiant is without further review, the interest of the said Gillis in the second

mortgage and note under attachment in the case to be tried by your Affiant and his client. That the said Jerry Manning then and there stated that the sum of approximately \$2,000.00 or \$3,000.00, which at any rate, was the amount due from the North Star Bakery to the said Gillis at the time of the attachment, was being held for payment over by virtue of the levy upon the said attachment; that affiant at that time informed the said Jerry Manning that he believed that the bank was operating under a mistake of law. However, the said Jerry Manning did then and there say that the transaction had been made with the advice of an attorney and in the presence of Mr. Gillis and the owners of North Star Bakery. Very little if anything else was said and your Affiant and Mr. Wallace left the bank. Thereafter, judgment was obtained upon the said note and that judgment was settled by the said bank. The facts pertaining to this judgment and settlement would more clearly appear in the records and files in that case. Affiant does not know anything concerning the transaction between Gillis and the owners of North Star Bakery and the bank than what was told to him by the said Jerry Manning at that time and he did not discuss the case with the owners of the North Star Bakery or the said Gillis.

Further your Affiant sayeth not.

/s/ ROBERT A. PARRISH,
Affiant.

Subscribed and sworn to before me this 13th day of May, 1958.

[Seal] /s/ WARREN WM. TAYLOR,
Notary Public in and for the Territory of Alaska.
My Commission Expires May 7, 1961.

[Endorsed]: Filed June 13, 1958.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Fred D. Crane being first duly sworn on an oath deposes and says: That he is an attorney for Will M. Gillis. That I have read the Affidavit of James Von Der Heydt that it is quite correct if your affiant asked about the above case, but your affiant never had any time rendered an opinion or made any definite statement. Your affiant is however discuss the case G. R. Jackson who is then President of the Miners and Merchants Bank of Alaska the particular discussion was the right of the note to attached your affiant stated that he had not gone into the question but that he knew that Mr. Parrish was a careful attorney and undoubtedly he knew his procedure.

Your affiant later examined the matter and concurred with Mr. Parrish at the time the transaction was made between Will M. Gillis and the Miners

and Merchants Bank and the North Star, your affiant was not requested or invited to be present although it was well-known that your affiant was the attorney for Will M. Gillis and the defendant in this action bought Gillis' equity well knowing that the note, mortgage and assets of Will M. Gillis were under attachment.

/s/ FRED D. CRANE.

Subscribed and sworn to before me this 13th day of June, 1958.

[Seal] /s/ MARY C. DIEDE,
Notary Public in and for the Territory of Alaska.

My Commission expires Oct. 24, 1960.

[Endorsed]: Filed June 13, 1958.

[Title of District Court and Cause.]

TRANSCRIPT OF DECISION ON MATTER
FOR SUMMARY JUDGMENT

Before: Honorable Walter H. Hodge,
District Judge.

Appearances:

TAYLOR & TAYLOR,
Fairbanks, Alaska, and

FRED D. CRANE,
Nome, Alaska,
For Plaintiff.

JAMES A. von der HEYDT,
Nome, Alaska,
For Defendant.

Nome, Alaska, June 13, 1958.

Be It Remembered that at 2:00 p.m., Friday, June 13, 1958, the above-entitled matter came on to be heard with respect to the defendant's motion for summary judgment. Mr. von der Heydt was present in court; counsel for the plaintiff did not appear.

The Court: This is the time set for the hearing as twice continued at the request of the plaintiff, of the motion of the defendant for summary judgment in the case of Will P. Gillis vs. The Miners and Merchants Bank of Alaska, No. 4180. It appears that oral argument on the motion will not be necessary or required by the Court, pursuant to the provisions of Rule 5 (c) of our Amended Uniform Rules. The record may show counsel for the defendant present. One of the joint counsel for the plaintiff is confined in the hospital, but we have been in touch with him several times concerning this matter and he informed me just this morning that he would not request oral argument on the matter and agreed that the matter be submitted upon the pleadings, the depositions, the affidavits and the briefs on file, and I understand from counsel for the defendant Bank that he is likewise agreeable.

Mr. Von Der Heydt: Yes, your Honor. I would like only to state that I have had no opportunity to read Mr. Crane's affidavit or Mr. Parrish's affidavit

which the Court Reporter just handed me as you came in the room, but I presume——

The Court: I think we can dispose of those also, without this necessity of hearing from you concerning them.

It will be noted that plaintiff's brief in opposition to defendant's motion was received just today, which may be filed, from the office of Taylor and Taylor at Fairbanks, together with an exhibit and together with the affidavits of Fred D. Crane and of Robert A. Parrish, which may be filed. This despite the fact that this motion has been set for hearing since May 6, or more than a month, and that defendant's brief has been on file since May 17, and the depositions in support of the motion have been on file since April 11. Ample opportunity has then been afforded the plaintiff to oppose the motion.

I have gone into the matter very thoroughly and am prepared to announce decision upon it at this time. The situation is rather complex, but yet in the final analysis, I find that the issues are quite simple. In the first place two things are essential to be shown in order that the court may grant the relief requested by the defendant on its counterclaims, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The first, of course, is that the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue as to any material fact, and the second is that it must be shown that the moving party is entitled to judgment as a matter of law.

Taking up first the matter of whether or not there

is any genuine issue, I refer first to the pleadings. All of the material allegations of the defendant's counterclaim are admitted by the reply of the plaintiff, except as to certain facts which are denied either generally or on information and belief. Most significant to me is the admission in the reply of the allegation of the Bank that at the time plaintiff received from the defendant the sum of \$15,000.00 in full payment of the promissory note held by him of which the North Star Partners were the makers, the plaintiff knew that the note was not in his possession but had been attached by the United States Marshal. That admission to me is most controlling here. The plaintiff does deny that he intentionally withheld and kept such fact from the knowledge of the defendant and the North Star for the purpose of obtaining payment of \$15,000.00. But I do not believe that such intention, if that be true, is material here. The fact is that he accepted payment of the note which he did not then have in his possession or control.

As to the other denials, it has been held by this Court upon authority of other decisions, that mere denials are not sufficient to prevent the entry of a summary judgment, and that is especially true where the depositions and affidavits reveal no dispute of any material fact, and I am referring to the decision in the case of *Weston vs. Noble*, reported in 19 Federal Rules Decisions at page 416, in a case I had at Fairbanks, and the case of *Engl vs. Aetna Life Insurance Co.*, 139 F. 2d 469, together with

other authorities referred to in defendant's supplemental brief.

Turning then to the depositions and affidavits, upon very careful analysis I find only one supposed issue of fact controverted, and that is the allegation of the plaintiff that the defendant Bank knew of the attachment of the note and interest of the North Star under the mortgage securing the note at the time they made payment of it to Gillis. The depositions of Mr. James G. Manning of the Bank, and of Ernest Gustafson of the North Star partnership, deny that. In response to such allegation, the plaintiff has filed an affidavit of Robert A. Parrish who was the attorney for Joseph Wallace in the suit against Gillis in which the note was attached, and by this affidavit he recites a conversation with Mr. Manning of the Bank on the 18th of February, 1957, regarding the sale by the Marshal of this note, which was subsequent to the attachment, but prior to the sale. It is significant that this conversation was after the payment by the Bank to Gillis, which was on January 30. Therefore, this affidavit does not controvert the allegation of the Bank that they had no such knowledge. The affidavit of Mr. Crane states broadly that the defendant bought Gillis' equity well knowing that the note, mortgage and assets of Will M. Gillis were under attachment. That is not supported by any definite statement of fact. I also find that even if it were true that the Bank knew or should have known of such attachment, such knowledge or imputed knowledge would not be material to this controversy for the reasons which I

will later explain. Therefore I find that there is no issue of any material fact for trial in this case. That is, I should perhaps qualify that by saying there is no genuine issue. The facts are clearly not in dispute so far as they are material to this motion.

We then come to the question of whether or not under the undisputed facts the Bank is entitled to judgment as a matter of law. The plaintiff has not sought summary judgment but obviously he is not entitled to judgment under these facts, either under his first cause of action or upon the second, which is contingent upon the first, because for the plaintiff to recover the amount of money held in the Bank would be an unjust enrichment of the worst sort and is not justifiable either in law or equity or justice or common sense.

I also believe that the Bank is not entitled to summary judgment for the sum of \$15,000.00 paid to Gillis to satisfy the note, for several reasons. First, the Bank is not damaged thereby. The Bank now holds the note of the North Star which includes this indebtedness which they paid on behalf of the North Star, and holds ample security for such note. Second, seeking to recover the amount voluntarily paid to Gillis without recovering the note would probably be an inconsistent position and the doctrine of estoppel would likely apply. Now it is suggested that the Bank as the present holder in due course of the note by reason of the final redemption to Wallace from the Marshal's sale might still recover against the North Star. I do not think that is true as a matter of law, for the reason that there has been a com-

plete accord and satisfaction between the Bank and the North Star for the indebtedness represented by the note, which is the same debt, except a new note; and for the further reason that the North Star is not a party to this action.

On the other hand I believe it is equally clear that the Bank is entitled to recover the sum of \$11,-225.00, which it is holding in a suspense account by reason of the payment which the Bank was undoubtedly required to make for its security to the judgment creditor, Wallace, who certainly was a holder in due course of the note, by reason of which the Bank's situation with respect to the indebtedness owing to it by the North Star was indeed endangered, for instead of a first lien the Bank then found its position was subordinate to that of Wallace.

The plaintiff seems to rely wholly or almost wholly upon the assignment which he gave to the Bank for repayment to the Bank of advances on his contract, claiming that the Bank could not withhold more than was contemplated by the assignment. I do not think that is true as a matter of law, for surely the Bank has a lien upon moneys in its possession belonging to the depositor or for any indebtedness owing to the Bank. I believe that the Bank is entitled to such money either upon the principle of restitution as set forth in defendant's counterclaim and brief, or upon the theory of subrogation to the rights of Wallace as judgment creditor, or both. As a matter of fact, subrogation is in a sense a method of restitution. I find that in

law and in equity the Bank is entitled to that money, and it certainly would be most unjust that Gillis should recover it and thus enrich himself by receipt of money for payment of a note which has already been paid to him as a matter of fact, which has, in a sense, been paid twice, because not only did he get the money for the note but he also through this action of the Bank secured payment of a judgment against him.

The only possible theory advanced by the briefs upon which the Bank would be denied such remedy is not actually suggested by counsel, but I presume it would be an estoppel by reason of the negligence which they claim of the Bank in making payment of the note to Gillis without getting the note. Again it is not suggested as to why such negligence, if there was negligence, would be a defense, but I can conceive that it would be only on that theory. Examining the text of estoppel in 19 Am. Jur. reference is made to the fundamental principle of equitable estoppel which is that a party will not be permitted to occupy inconsistent positions or take a position in regard to a matter which is directly contrary to or inconsistent with one previously assumed by him or it. I can find no such inconsistency in the claim of the Bank to recover the \$11,225.00 which they were forced to pay in order to protect their interest, to the judgment creditor. I also find by the same text, Sec. 66, that mere carelessness or neglect of what would be prudent in respect of the interest of the party claimed to be estopped is not sufficient to estop him from claiming such remedy.

Therefore I cannot find that the Bank by reason of any negligence in failing to obtain possession of the note is estopped from asserting the present remedy.

I find, therefore, from the pleadings, the depositions, the affidavits, and the briefs on file, that the defendant Bank is entitled to recover judgment upon its counterclaim against the plaintiff Gillis in the sum of \$11,225.00, together with interest thereon at 6% from July 18, 1957, which is the date of their payment of this sum to Wallace, and that the Bank may apply against such judgment the sum of \$11,225.00 which it is holding in a suspense account—I think represented by a cashier's check.

The Bank is also entitled to recover its costs, including the cost of necessary depositions, and an attorney's fee which should be computed according to Rule 25, which I find will amount to \$724.50. Judgment may be presented accordingly in favor of the defendant on its counterclaim. As I recall, no findings of fact or conclusions of law will be necessary. That is true under the provisions of Rule 52 of the Rules of Civil Procedure. I think that covers it. Did I miss anything, counsel?

Mr. Von Der Heydt: I do not believe so, your Honor.

(There were no further proceedings in this matter and court remained in session for other business.)

This will certify that I, Mary C. Diede, in my official capacity as Court Reporter, United States

District Court, Second Division, Alaska, did report the oral proceedings in open court in cause No. 4180 on June 13, 1958, at Nome, Alaska;

That I reported such proceedings in stenograph machine shorthand and that the foregoing pages numbered 1 to 8, inclusive, contain a full, true and accurate transcript of the proceedings, prepared by me from my original notes to the best of my knowledge and ability.

Dated at Nome, Alaska, this 18th day of June. 1958.

/s/ MARY C. DIEDE.

[Endorsed]: Filed June 18, 1958.

In the District Court for the District of Alaska,
Second Judicial Division

No. 4180 Civil

WILL M. GILLIS,

Plaintiff,

vs.

MINERS AND MERCHANTS BANK OF
ALASKA,

Defendant.

SUMMARY JUDGMENT

This Matter having come on for hearing before the Court at Nome, Alaska, on the 13th day of June,

1958, on defendant's motion for Summary Judgment under Rule 56 FRCP, and the Court thereupon having rendered its decision upon said motion,

And, it appearing to the Court that the pleadings, depositions, admissions and affidavits on file herein show that there is no genuine issue as to any material fact; that all relief sought by the plaintiff in this action should be denied, and that defendant is entitled to judgment as a matter of law upon counterclaim against plaintiff,

Now, Therefore, it is hereby Ordered, Adjudged, and Decreed,

1. Defendant's motion for Summary Judgment is granted, and defendant shall have and recover from plaintiff upon its Second counterclaim, the sum of \$11,225.00, plus interest at the rate of 6% per annum from July 18, 1957, until paid, together with defendant's costs incurred herein to be taxed by the Clerk of this Court, which costs shall include the sum of \$724.50 as an attorney fee for defendant to be endorsed hereon by the clerk.

2. The defendant may apply in partial satisfaction of this judgment monies of plaintiff in the amount of \$11,225.00, which defendant has in its possession.

3. All relief sought by plaintiff be and it hereby is denied, and plaintiff shall have and recover nothing by this action, and plaintiff's cause of action is dismissed.

Done at Nome, Alaska, this 30th day of June, 1958.

/s/ WALTER H. HODGE,
District Judge.

\$86.50 costs.

/s/ J. M. KROMINGER,
Clerk.

Lodged: June 23, 1958.

[Endorsed]: Filed June 30, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Will M. Gillis, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the summary judgment entered in this action on June 30, 1958.

Dated: July 17, 1958.

/s/ FRED D. CRANE,
Attorney for Appellant.

[Endorsed]: Filed July 17, 1958.

In the District Court for the District of Alaska,
Second Judicial Division

No. 4180

WILL M. GILLIS,

Plaintiff,

vs.

MINERS & MERCHANTS BANK,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable Walter H. Hodge,
District Judge.

Appearances:

TAYLOR & TAYLOR,

Fairbanks, Alaska, and

FRED D. CRANE,

Nome, Alaska,

For Plaintiff.

JAMES A. VON DER HEYDT,

Nome, Alaska,

For Defendant.

February 28; June 12; June 13, 1958

Be It Remembered that at approximately 10:15 a.m., February 28, 1958, court having convened previously for other business, the motion of the defendant to dismiss in cause No. 4180 came on regularly to be heard. The plaintiff was represented by

Fred D. Crane and the defendant was represented by Mr. James A. von der Heydt, the Honorable Walter H. Hodge presiding.

The Court: Gillis vs. Miners & Merchants Bank, No. 4180, the motion of the defendant to dismiss. I presume counsel would like to be heard.

Mr. Crane: Yes, your Honor.

The Court: Very well. Suppose I take care of these contested matters first, and we will take this motion up.

(The Court then heard proceedings with reference to other matters.)

The Court: Now then, we will take up the motion in the case of Gillis vs. Miners & Merchants Bank. I have read the briefs submitted by the parties, and the pleadings, and have examined the decisions available here that are cited by counsel in their briefs, although not too thoroughly as yet, together with some other authorities which I have looked into. But I would like to hear from counsel in support of his motion if there is anything further that he would like to add to the brief, or that which may be urged, particularly with respect to the motion on both counts.

(Arguments of counsel were not reported.)

The Court: Gentlemen, it is true, of course, that under the Federal Rules of Civil Procedure evidentiary facts need not be pleaded. There is a distinction, as we had pointed out in a previous case in this court, between the former principle of plead-

ing a cause of action and the present rule of pleading a claim, and to the extent that the former rule applies, two of the cases cited by counsel for the defendant in their brief have no application here. That is the case of *Baltimore Steamship Company vs. Phillips*, 274 U.S. 316, and *Miller vs. National Bank*, 166 F. 2d 723, 727. The former was a decision of the Supreme Court long before adoption of the Federal Rules, and the latter is a decision under the New York Civil Practice Act and not the Federal Rules. However, the courts have not gone so far as to hold that you need not plead facts sufficient to constitute a claim, and I rather think that the Rule as stated by the Circuit Court for the Ninth Circuit in the case of *Patten vs. Dennis* (134 F. 2d 137, CCA 9, 1943) is about as clear as we have in this jurisdiction on that point. That is, that there still must be pleaded a statement of sufficient facts showing a right in the claim and the violation of that right.

In this respect I find that the claim is faulty. It does not, as claimed by plaintiff in his supplemental brief, show either by the claim itself or the assignment pleaded as an exhibit that there was an agreement to promptly account and remit to plaintiff an excess over the advances by the Bank. It does not, as also claimed by the plaintiff, contain any allegation or claim that the money was misappropriated by the Bank under some pretense of creating an expense account. The complaint merely states that there was an assignment to the Bank, which is an exhibit, and that the Bank collected certain moneys

on this assignment and wrongfully misappropriated the balance. But the assignment being pleaded as an exhibit is a part of the complaint, and when we read the assignment we find that it is an assignment of all amounts then due or owing or which may thereafter become due and owing by the City of Nome to the plaintiff, and we further find that the assignment is expressly made to secure and provide for the payment of any and all obligations now due and owing or which may be hereafter due and owing by the assignor or the plaintiff to the Bank. There is no allegation whatever in the complaint that all obligations secured by the assignment, obligations of the plaintiff, were in fact paid, and unless there is such a claim surely the complaint does not state a claim.

There is another rule, of course, that the claim must show sufficient facts to enable the defendant to plead to it, that is, sufficient to advise the other party in order that he may plead. Legal conclusions of law are not enough, and I find that the complaint is obviously faulty in that it does not claim any breach of conditions of the assignment which is pleaded, and that unless a claim is made that all indebtedness secured by the assignment was paid, there is no claim for either moneys received, or debt, or conversion. Conversion is apparently what is intended.

Therefore I find that the first cause of action fails to state a claim. If it be a fact that all indebtedness was paid by the Bank and that there was an agreement that the Bank should remit the excess collected by it promptly to the plaintiff, then such should be pleaded. We cannot guess at it as the Court here is requested to do.

As to the second count, it is not clear from the complaint whether the damages claimed are for loss of profits or whether for expense or penalty or what. And I think that is hardly sufficient to enable the defendant to plead to it. But there is a greater fault. It is claimed by the defendant that damages for loss of profits will not lie in an action on a contract as not contemplated by the parties. There is generally such a rule, but it is also true that damages may be recovered in a proper case in an action for conversion. Whether or not this claim is actually for conversion or whether for money had or received it is difficult to determine. It is also claimed that damages must not be remote and speculative, but that is more a matter of proof than a matter of pleading.

The difficulty, as I find it, as to Count No. 2, is that unless a cause of action is pleaded in Count No. 1 for conversion, there is no claim under Count No. 2, which incorporates Count 1 in Count 2. Therefore, because the first claim incorporated in the second does not plead clearly a claim in conversion of specific money or property, a claim for damages for such conversion must also fail.

Now in this connection I am not convinced that the party seeking recovery for trover or conversion need recover the specific property in the sense that defendant here claims, that is, that it has to be the same check or money order or draft. I do not think that decision intends to go that far. But there must be a claim for specific property in the sense of money had and received by the Bank, as here, for a

specific purpose. So in the absence of a sufficient claim in conversion—for conversion—there is no sufficient claim for damages, because obviously if this be merely a claim for debt then damages for loss of profits would not be permissible at all. So again the claim under Count 2 must depend upon proper allegations of the complaint for conversion in Count 1.

Therefore, I find that the motion to dismiss must be granted for want of the complaint to state a claim. However, the plaintiff may have leave to amend, if the claim can be properly pleaded. How much time would you like?

Mr. Crane: I would like at least 20 days, your Honor, because I am going to be away from Nome for seven days, going out of here tomorrow, and then I will have to go to Fairbanks on the 14th to try a case on the 17th.

The Court: Very well. Any objections to 20 days, counsel?

Mr. Von Der Heydt: No, your Honor. That is quite all right.

The Court: A minute order may be entered granting the motion of the defendant to dismiss as to both causes of action, with 20 days' leave to the plaintiff to amend.

(There were no further proceedings in this matter at this time.)

(On June 6, 1958, a minute order was entered continuing the hearing of defendant's motion for summary judgment until June 12, 1958.)

Be It Remembered That 1:30 p.m., Thursday, June 12, 1958, in open court the following proceedings took place with reference to cause No. 4180. Mr. James A. von der Heydt was present for the defendant; counsel for plaintiff was unable to be present; the Honorable Walter H. Hodge presiding.

The Court: We were to take up at this time the case of Gillis vs. Miners and Merchants Bank, No. 4180. I have by telephone conversed with a Mrs. Jackson at Fairbanks, a law clerk in Mr. Taylor's office and agreed to extend until tomorrow the time for filing briefs on behalf of the plaintiff in this case. I see by the file that it has not yet been filed. The difficulty stems in part from Mr. Crane's illness, but she seemed to be of the opinion that all matters had been postponed in which he was interested and I informed her to the contrary. So if there is no objection——

Mr. Von Der Heydt: Do you wish to set it over then? Until 1:30 tomorrow?

The Court: Yes, 1:30 tomorrow.

(There were no further proceedings in the matter at this time.)

Be It Remembered that at 2:00 p.m. Friday, June 13, 1958, the above-entitled matter came on to be heard with respect to the defendant's motion for summary judgment. Mr. von der Heydt was present in court for the defendant; counsel for plaintiff did not appear. The Honorable Walter H. Hodge presided.

The Court: This is the time set for the hearing

as twice continued at the request of the plaintiff, of the motion of the defendant for summary judgment in the case of Will P. Gillis vs. The Miners and Merchants Bank of Alaska, No. 4180. It appears that oral argument on the motion will not be necessary or required by the Court, pursuant to the provisions of Rule 5 (c) of our Amended Uniform Rules. The record may show counsel for the defendant present. One of the joint counsel for the plaintiff is confined in the hospital, but we have been in touch with him several times concerning this matter and he informed me just this morning that he would not request oral argument on the matter and agreed that the matter be submitted upon the pleadings, the depositions, the affidavits and the briefs on file, and I understand from counsel for the defendant Bank that he is likewise agreeable.

Mr. Von Der Heydt: Yes, your Honor. I would like only to state that I have had no opportunity to read Mr. Crane's affidavit or Mr. Parrish's affidavit which the Court Reporter just handed me as you came in the room, but I presume——

The Court: I think we can dispose of those also, without the necessity of hearing from you concerning them.

It will be noted that plaintiff's trial brief in opposition to defendant's motion was received just today, which may be filed, from the office of Taylor and Taylor at Fairbanks, together with an exhibit and together with the affidavits of Fred D. Crane and of Robert A. Parrish, which may be filed. This despite the fact that this motion has been set for

hearing since May 6, or more than a month, and that defendant's brief has been on file since May 17, and the depositions in support of the motion have been on file since April 11. Ample opportunity has then been afforded the plaintiff to oppose the motion.

I have gone into the matter very thoroughly and am prepared to announce decision upon it at this time. The situation is rather complex, but yet in the final analysis, I find that the issues are quite simple. In the first place two things are essential to be shown in order that the court may grant the relief requested by the defendant on its counterclaim, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The first, of course, is that the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue as to any material fact, and the second is that it must be shown that the moving party is entitled to judgment as a matter of law.

Taking up first the matter of whether or not there is any genuine issue, I refer first to the pleadings. All of the material allegations of the defendant's counterclaim are admitted by the reply of the plaintiff, except as to certain facts which are denied either generally or on information and belief. Most significant to me is the admission in the reply of the allegation of the Bank that at the time plaintiff received from the defendant the sum of \$15,000.00 in full payment of the promissory note held by him of which the North Star Partners were the makers, the plaintiff knew that the note was not in his

possession but had been attached by the United States Marshal. That admission to me is most controlling here. The plaintiff does deny that he intentionally withheld and kept such fact from the knowledge of the defendant and the North Star for the purpose of obtaining payment of \$15,000.00. But I do not believe that such intention, if that be true, is material here. The fact is that he accepted payment of the note which he did not then have in his possession or control.

As to the other denials, it has been held by this Court upon authority of other decisions, that mere denials are not sufficient to prevent the entry of a summary judgment, and that is especially true where the depositions and affidavits reveal no dispute of any material fact, and I am referring to the decision in the case of *Weston vs. Noble*, reported in *Federal Rules Decisions* at page 416, in a case I had at Fairbanks, and the case of *Engl vs. Aetna Life Insurance Co.*, 139 F. 2d 469, together with other authorities referred to in defendant's supplemental brief.

Turning then to the depositions and affidavits, upon very careful analysis I find only one supposed issue of fact controverted, and that is the allegation of the plaintiff that the defendant Bank knew of the attachment of the note and interest of the North Star under the mortgage securing the note at the time they made payment of it to Gillis. The depositions of Mr. James G. Manning of the Bank, and of Ernest Gustafson of the North Star partnership, deny that. In response to such allegation, the plaintiff has filed an affidavit of Robert A. Parrish who

was the attorney for Joseph Wallace in the suit against Gillis in which the note was attached, and by this affidavit he recites a conversation with Mr. Manning of the Bank on the 18th of February, 1957, regarding the sale by the Marshal of this note, which was subsequent to the attachment but prior to the sale. It is significant that this conversation was after the payment by the Bank to Gillis, which was on January 30. Therefore, this affidavit does not controvert the allegation of the Bank that they had no such knowledge. The affidavit of Mr. Crane states broadly that the defendant bought Gillis' equity well knowing that the note, mortgage and assets of Will M. Gillis were under attachment. That is not supported by any definite statement of fact. I also find that even if it were true that the Bank knew or should have known of such attachment, such knowledge or imputed would not be material to this controversy for the reasons which I will later explain. Therefore I find that there is no issue of any material fact for trial in this case. That is, I should perhaps qualify that by saying there is no genuine issue. The facts are clearly not in dispute so far as they are material to this motion.

We then come to the question of whether or not under the undisputed facts the Bank is entitled to judgment as a matter of law. The plaintiff has not sought summary judgment but obviously he is not entitled to judgment under these facts, either under his first cause of action or upon the second, which is contingent upon the first, because for the plaintiff to recover the amount of money held in

the Bank would be an unjust enrichment of the worst sort and is not justifiable either in law or equity or justice or common sense.

I also believe that the Bank is not entitled to summary judgment for the sum of \$15,000.00 paid to Gillis to satisfy the note, for several reasons. First, the Bank is not damaged thereby. The Bank now holds the note of the North Star which includes this indebtedness which they paid on behalf of the North Star, and holds ample security for such note. Second, seeking to recover the amount voluntarily paid to Gillis without recovering the note would probably be an inconsistent position and the doctrine of estoppel would likely apply. Now it is suggested that the Bank as the present holder in due course of the note by reason of the final redemption to Wallace from the Marshal's sale might still recover against the North Star. I do not think that is true as a matter of law, for the reason that there has been a complete accord and satisfaction between the Bank and the North Star for the indebtedness represented by the note, which is the same debt, except a new note; and for the further reason that the North Star is not a party to this action.

On the other hand I believe it is equally clear that the Bank is entitled to recover the sum of \$11,225.00, which it is holding in a suspense account by reason of the payment which the Bank was undoubtedly required to make for its security to the judgment creditor, Wallace, who certainly was a holder in due course of the note, by reason of which the Bank's situation with respect to the indebtedness

owing to it by the North Star was indeed endangered, for instead of a first lien the Bank then found its position was subordinate to that of Wallace.

The plaintiff seems to rely wholly or almost wholly upon the assignment which he gave to the Bank for repayment to the Bank of advances on his contract, claiming that the Bank could not withhold more than was contemplated by the assignment. I do not think that is true as a matter of law, for surely the Bank has a lien upon moneys in its possession belonging to the depositor or for any indebtedness owing to the Bank. I believe that the Bank is entitled to such money either upon the principle of resitution as set forth in defendant's counterclaim and brief, or upon the theory of subrogation to the rights of Wallace as judgment creditor, or both. As a matter of fact, subrogation is in a sense a method of resitution. I find that in law and in equity the Bank is entitled to that money, and it certainly would be most unjust that Gillis should recover it and thus enrich himself by receipt of money for payment of a note which has already been paid to him as a matter of fact, which has, in a sense, been paid twice, because not only did he get the money for the note but he also through this action of the Bank secured payment of a judgment against him.

The only possible theory advanced by the briefs upon which the Bank would be denied such remedy is not actually suggested by counsel, but I presume it would be an estoppel by reason of the negligence

which they claim of the Bank in making payment of the note to Gillis without getting the note. Again it is not suggested as to why such negligence, if there was negligence, would be a defense, but I can conceive that it would be only on that theory. Examining the text of estoppel in 19 Am. Jur. reference is made to the fundamental principle of equitable estoppel which is that a party will not be permitted to occupy inconsistent positions or take a position in regard to a matter which is directly contrary to or inconsistent with one previously assumed by him or it. I can find no such inconsistency in the claim of the Bank to recover the \$11,225.00 which they were forced to pay in order to protect their interest, to the judgment creditor. I also find by the same text, Sec. 66, that mere carelessness or neglect of what would be prudent in respect of the interest of the party claimed to be estopped is not sufficient to estop him from claiming such remedy. Therefore I cannot find that the Bank by reason of any negligence in failing to obtain possession of the note is estopped from asserting the present remedy.

I find therefore, from the pleadings, the depositions, the affidavits, and the briefs on file, that the defendant Bank is entitled to recover judgment upon its counterclaim against the plaintiff Gillis in the sum of \$11,225.00, together with interest thereon at 6% from July 18, 1957, which is the date of their payment of this sum to Wallace, and that the Bank may apply against such judgment the sum of \$11,225.00 which it is holding in a suspense account—I think represented by a cashier's check.

The Bank is also entitled to recover its costs, including the cost of necessary depositions, and an attorney's fee which should be computed according to Rule 25, which I find will amount to \$724.50. Judgment may be presented accordingly in favor of the defendant on its counterclaim. As I recall, no findings of fact or conclusions of law will be necessary. That is true under the provisions of Rule 52 of the Rules of Civil Procedure. I think that covers it. Did I miss anything, counsel?

Mr. Von Der Heydt: I do not believe so, your Honor.

(There were no further proceedings in this matter and court remained in session for other business.)

REPORTER'S CERTIFICATE

This will certify that I, Mary C. Diede, in my official capacity as Court Reporter, Second Judicial Division, District of Alaska, did report the oral proceedings in open court in cause No. 4180, Gillis vs. Miners and Merchants Bank, at Nome, Alaska, on February 28, June 12 and June 13, 1958, with the exception of certain argument of counsel which was not reported;

That I reported such proceedings in stenograph machine shorthand and that the foregoing pages numbered 1 to 13, inclusive, contain a full, true and correct transcript of the proceedings in such cause, with the exception of argument as noted therein, prepared by me from my original notes to the best of my knowledge and ability.

Dated at Nome, Alaska, this 21st day of August, 1958.

/s/ MARY C. DIEDE.

[Endorsed]: Filed August 22, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Alaska,
Second Division—ss.

I, J. M. Kroninger, Clerk of the United States District Court, Territory of Alaska, Second Division, do hereby certify that the foregoing documents requested in the Designation on Appeal by Fred D. Crane, Attorney for Appellant, the original Complaint, Motion to Dismiss, Amended Complaint, Answer, Reply, Motion for Summary Judgment, Affidavits in Support Thereof and Counter Affidavits, Filed Copy of Transcript of Decision of Court on Motion for Summary Judgment, Summary Judgment, Notice of Appeal Filed July, 17, 1958, and Designation of Record on Appeal in the case of Will M. Gillis, Plaintiff vs. Miners and Merchants Bank, Defendant, No. 4180 Civil this Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court this 18th day of August, A.D. 1958.

[Seal] /s/ J. M. KRONINGER,
Clerk of Court.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Alaska,
Second Division—ss.

I, J. M. Kroninger, Clerk of the United States District Court for the District of Alaska, Second Division, do hereby certify that foregoing contains the following original papers requested in the Counter-designation of Contents of Record on Appeal, filed by counsel for the appellee:

1. Deposition of James G. Manning with Exhibits 1 to 11, inc.
2. Deposition of Ernest H. Gustafson with Exhibits 1 to 7, inc.
3. Reporter's transcript of proceedings, Feb. 28, June 12 and 13, 1958.
4. Counter-designation of Contents of Record on Appeal.

The following papers requested in the counter-designation of contents of record on appeal are not included as they were previously forwarded to the Ninth Circuit Court of Appeals on August 18, 1958: Affidavit of James A. Von Der Heydt, Notice of Appeal, Filed July 17, 1958, Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court this 23rd day of August, A. D. 1958.

[Seal] /s/ J. M. KRONINGER,
Clerk.

[Endorsed]: No. 16147. United States Court of Appeals for the Ninth Circuit. Will M. Gillis, Appellant, vs. Miners and Merchants Bank of Alaska, a Corporation, Appellee. Transcript of Record. Appeal From the District Court for the District of Alaska, Third Division.

Filed: August 25, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16147

WILL M. GILLIS,

Appellant,

vs.

MINERS AND MERCHANTS BANK OF
ALASKA,

Appellee.

STATEMENT OF POINTS RELIED UPON
ON APPEAL

Pursuant to Rule 17 (6) of the Rules of the U. S. Court of Appeals, Ninth Circuit, Appellant states the point upon which he will rely upon appeal as follows:

1. The Court erred in granting Defendant's motion for summary judgment in the said cause.
2. That the said summary judgment was not based upon facts or the law.

Dated at Fairbanks, Alaska, this 22nd day of October, 1958.

FRED D. CRANE,
WARREN A. TAYLOR &
WARREN WM. TAYLOR,
Attorneys for Appellant;

By /s/ WARREN A. TAYLOR,
Of Counsel.

[Endorsed]: Filed October 24, 1958.

